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PREFACE TO THE SECOND EDITION.

THIS is rather a new book than a new edition, the contents having increased three-fold, and the matter of the first edition (so far as it is now relevant) having been re-cast in a new shape. A Code of Evidence, constructed with special reference to the requirements of the country, has now been substituted for the former fragmentary and unsatisfactory state of the law described at pages 15—17 of the following *Introduction*.[1] So important a change in the subject-matter of the work has necessitated a change in the plan and object of the work itself. This plan and object may now be thus described:

The Evidence Act, like every Code, consists of a number of abstract rules. In order to understand fully these rules, a knowledge of principles is required, which cannot be conveyed by the provisions of an Act of the Legislature, and which must be acquired from sources *dehors* any such Act. The meaning, the object, the proper application of a rule will be better and more fully comprehended in proportion as the origin, the development, and the history of the principles upon which it is founded are known and understood. Acquaintance with the stages through which it has passed, and the alterations to which it has been from time to time subjected, can alone account for and explain its present shape and the language in which it has been finally promulgated. Every word of the abstract proposition in which it is expressed has been deliberately chosen with reference to some decided case, to some doubt that has been raised and solved, to some improvement introduced, to some alteration deliberately made. I have endeavoured in the following pages to supplement the Act itself with this

[1] See paragraphs 11—14 of the Introduction to the present edition.

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enacted in an amended and improved form in 1872. Portions of substantive civil law have been codified in "*The Indian Succession Act*, 1865," "*The Indian Divorce Act*, 1869," and "*The Indian Contract Act*, 1872." The work that is thus being done in British India will hereafter form an important page in the history of Great Britain, and its effects will, in all human probability, re-act upon England herself. When Rome allowed the Prætor's edict to modify and temper the *jus civile* with the broader principles of the *jus gentium*, making a necessary concession to her own progress and to the wants of the many new citizens, which were added to her ever-widening circle, she laid the real foundation-stone of that grand structure which has outlived the ruin and fall of her material empire. The *jus honorarium*, offspring of the union of the *jus civile* and the *jus gentium*, not only fulfilled the requirements of its own time and nation, but also generated that system of law which to this day exercises its influence upon Europe. So it may well be that the work which England is doing in India will in time re-act upon herself and bring about that simplification and codification which have been long spoken of, but the accomplishment of which has been beset by difficulties hitherto insuperable. If this result is ever to be realized, and if it is to be at all attributable to the success of the Indian Codes, that success must be indubitable. In order to achieve such a success, the Codes must be administered by men whose education in law is not merely limited to the letter of the Codes themselves. The rule itself will be often misunderstood where the reason of the rule is not known. Those will best understand and apply the rule who know the object and intention with which it was framed, and with which the language in which it is expressed was selected. Language, like other things human, is imperfect; and how great soever be the precision with which it is chosen, however superior be the skill of the draftsman, the language of every Code needs to be supplemented by the knowledge just described, and the

mind of the reader to be trained by the study thereof. The following pages are an attempt to put this knowledge in an accessible shape and so contribute to the end indicated, so far as concerns one portion of the codified law of India.

C. D. F.

April, 1873.

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Ditto ditto—Decisions of the Privy Council	W. R. P. C.
Ditto ditto—Criminal Rulings	W. R. Crim. Rul.
N. B.—The Weekly Reporter commencing with Vol. VII. consists of three parts as above.	
Indian Jurist, Old Series (Calcutta High Court)	Ind. Jur. O. S.
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INTRODUCTION.

§ 1. THE functions of a Court of Justice are twofold, *viz.* 1*st*, to ascertain the existence or non-existence of certain facts; 2*nd*, to apply the *substantive* law to ascertained facts and declare the rights or liabilities of parties in so far as they are affected by such[1] facts. For example, in a criminal trial it must first be ascertained whether the prisoner committed certain acts or was guilty of certain omissions;[2] and, if it be shown that he did commit such acts or was guilty of such omissions, the Court proceeds to annex the legal consequence, *viz.* declare him liable to a certain punishment. In a civil trial, in the same manner, the Court has first to ascertain whether the parties did certain acts, or whether a certain state of things[3] exists,—as for instance, whether the defendant executed a certain bond in favour of the plaintiff; or whether the plaintiff is the legitimate son of a certain person, and therefore rightful heir to certain property which he claims under the laws of inheritance; or whether a certain house is out of repair, in respect of which damages are claimed from a tenant who had covenanted to keep it in repair; or whether a certain stream is fordable which separates accreted soil from the plaintiff's estate (see cl. 3, s. 4, Bengal Reg. XI of 1825). The execution or non-execution of the bond, the state of repair or non-repair of the house having been established, the Court annexes the legal consequence, *viz.* declares the defendant liable to pay or

Functions of a Court of Justice.

[1] I do not regard the *enforcement* of the rights or liabilities thus declared as one of the proper functions of a Court of Justice. In civil cases in India the Courts perform this duty, but it is really a ministerial duty.

[2] See Section 32 of the Indian Penal Code.

[3] The definition of "fact" in the Indian Evidence Act includes a "state of things"—see section 3.

not to pay a certain amount of money. The fact of legitimate sonship, or the fordability or non-fordability of the river being proved or disproved, the Court declares that the plaintiff has or has not a right to the possession of certain property. If the facts of each case were undisputed, if there was no contention as to whether certain acts had been committed, or as to whether or not a certain state of things existed, the Court would merely have to apply the substantive law and to declare the consequences resulting from such application,—a duty which, though it might occasionally present some difficulty, would in the great majority of cases be sufficiently simple. But men, through misinformation, mistake, misunderstanding and human imperfection, and occasionally from less excusable causes, seldom admit or are agreed about the *facts*; and the Court, before it can apply the *substantive* law, has to sift out from a mass of contradiction, misconception, error, often stupidity, and sometimes dishonesty, fraud and falsehood, the true *facts* to which the substantive law is to be applied. The means whereby the Court informs itself of the existence of these facts is called EVIDENCE.[1]

Meaning of the word "Evidence."

§ 2. The word "evidence" is derived from the Latin word "*evidens*," "*evidere*," which means "to show clearly; to make clear to the sight; to discover clearly;

[1] "Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused; if the proceeding is civil, the object is to ascertain some right of property or of *status*, or the right of one party, and the liability of the other, to some form of relief. All rights and liabilities are dependant upon and arise out of *facts*, and facts fall into two classes, those which can, and those which cannot, be perceived by the senses."—*Report of the Select Committee on the Evidence Bill.*

"In order that the Judge may decide upon a question in litigation, it is necessary that the parties to the action should satisfy him of the truth of the *facts* submitted for his decision. But they must not only satisfy the Judge; they must also prove the *facts* adduced. Facts that must be proved, and such as affect and are relevant to the decision to be given are uncertain facts,—that is, such as are disputed by the other party."—*Modern Roman Law, by Tomkins and Jencken*, p. 92.

to make plainly certain; to ascertain; to prove." "Evidence," says Blackstone, "signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other."—"The word evidence," says Mr. Taylor "includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of *fact*, the truth of which is submitted to judicial investigation."—Unless the facts be correctly ascertained, however exact be the application of the substantive law, the result cannot (except by pure chance) be free from error. The first and most essential step towards a right adjudication is therefore to ascertain the facts correctly. The value of rules which guide and assist in the performance of this duty must necessarily be very great, and thus we see the importance of the study of the Law of Evidence.

Substantive and Adjective Law.

§ 3. Mr. Bentham has used the phrase '*substantive law*' to designate that law which the Courts apply to ascertained facts in order to frame a judgment; as opposed to those rules by which they proceed in order to bring before them the parties, their witnesses, their documents and other materials for adjudication—to ascertain the facts by questioning the persons and inspecting the things—to record their judgments and if necessary, to enforce them. These last, or the rules of procedure he has termed "*adjective law.*" What Mr. Bentham calls 'substantive law,' was styled in a report presented to the Prussian Government in 1811, '*material law*;' and what Mr. Bentham calls 'adjective law' was there styled "*formal law.*" The former metaphor is drawn from the language of the *grammarians*; the latter from that of the *logicians*.[1] The

[1] Substantive law, or the law which the Courts are appointed to administer is called by the French lawyers *le fonds du droit*: adjective law, or the rules according to which the substantive law is to be administered, they call *la forme*. Mr. Austin does not like the phrases 'substantive law' and 'adjective law,' though he uses them largely in elucidating his own plan. His objection against them is that they suggest a wrong basis of division according to his very elaborate conception of what a scientific division should be—see Lectures xxxv and xlv, pp. 611 and 788 of edition of 1869 by Mr. Robert Campbell.

"Indian Penal Code" (Act XLV of 1860, amended by Act XXVII of 1870) is substantive law, and together with some other provisions contained in various *special*[1] and *local*[2] laws, forms the whole of the substantive criminal law administered in British India. The Code of Criminal Procedure (Act X of 1872) is, on the other hand, adjective law. So also the Code of Civil Procedure (Act X of 1877) is adjective law. The substantive Civil law of British India has not as yet been codified. It is to be found in various Acts[3] of the Indian Legislature, in the Hindu and Mahomedan law[4]; and, for

Examples.

[1] "A 'special law' is a law applicable to a particular subject."—Section 41 of the Indian Penal Code.

[2] "A 'local law' is a law applicable only to a particular part of British India."—Section 42, *id.*

[3] Those curious to follow out the subject can complete a list of these Acts by referring to the Author's "Chronological Table and Index to the Indian Statute Book"—Title "CIVIL LAW" in *Index*.

[4] Questions regarding succession, inheritance, marriage or caste, or any religious usage or institution, are to be decided according to Mahomedan law where the parties are Mahomedans, and according to Hindu law where the parties are Hindus, except in so far as such law has by Legislative enactment been altered or abolished—see Section 24 of the Bengal Civil Courts Act (VI of 1871) for the Provinces under the Lieutenant-Governors of Bengal and the North-Western Provinces (also *Shamshúl Nissa* v. *Zohra Bíbi and another*, 6 N-W-P. Rep. 2); Section 5 of Act IV of 1872 for the Panjáb; Section 16, Act III of 1873 for the Madras Presidency; Section 26, Regulation IV of 1827, which substitutes in the Bombay Presidency "the usage of the country in which the suit arose—if none such appears, the law of the defendant;" Section 3, Act XVIII of 1876 for Oudh; and Section 4, Act XVII of 1875 for Burmah. For the High Courts in the exercise of their *Ordinary Original Civil Jurisdiction*, see clause 19 of the Charter of 1865 of the Bengal High Court (which must be read with clause 18 of the Charter of 1862, and with the letter from the Judges of the old Supreme Court, dated 16th October 1830, which will be found at p. 22, Vol. I of Morley's Digest) and the corresponding clauses of the Bombay and Madras Charters. For the same Courts in the exercise of their *Extraordinary Original Civil Jurisdiction*, see clause 20 of the Bengal Charter of 1865, and the corresponding clauses of the Bombay and Madras Charters, and clause 13 of the North-Western Provinces' Charter. The High Courts in the exercise of their Civil Appellate Jurisdiction are to apply such law or equity and rule of good conscience as the Court in which the proceedings in the case were originally

cases not thus provided for, in the broad rule of *justice, equity, and good conscience*[1] prescribed for the Civil Courts in India as the rule of decision from the time that such Courts were first established under British rule. To these must be added, in so far as relates to the Presidency towns, the Common and Statute Law which prevailed in England in the year 1726, and which has not since been altered by Statutes extending to India or by the Acts of the Legislative Council of India—the Statute Law expressly or by necessary implication[2] extending to India, enacted since 1726, and not subsequently repealed—and the Civil Law as it obtained in the Ecclesiastical and Admiralty Courts in England.

Distinction between rules of evidence and other portions of Adjective Law not accurately observed.

§ 4. Rules of *procedure*, rules of *pleading* and rules of *evidence* all fall under the head of Adjective Law; but no very accurate line of distinction has been observed as to what forms the appropriate province of each set of rules respectively. Most English treatises on the *law of evidence* deal with many topics which according to a different classification belong to the head of *procedure*. To give an example, the Code of Civil Procedure enacts (Section 13) that—"No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title;" and the Code of Criminal Procedure enacts (Section

instituted ought to have applied—see clause 21 of the Bengal Charter of 1865 and the corresponding clauses of the Bombay and Madras Charters, and clause 14 of the North-Western Provinces' Charter.

[1] See Section 24, Act VI of 1871 for the Provinces under the Lieutenant-Governors of Bengal and the North-Western Provinces; Section 6, Act IV of 1872 for the Panjáb; Section 16, Act III of 1873 for the Madras Presidency; Section 26, Regulation IV of 1827 for the Bombay Presidency; Section 3, Act XVIII of 1876 for Oudh; Section 4, Act XVII of 1875 for Burmah; and the previous Note for the High Courts in the exercise of their Civil Jurisdiction, Original and Appellate.

[2] See 5 Bom. H. C. Rep. 91.

460) that a man shall not be tried again for an offence for which he has once been acquitted or convicted. The matter of these provisions has been treated by most text-writers as belonging to the subject of 'evidence;' but other authorities think it to be concerned not with 'evidence' but with 'procedure;' and such is the view that has been taken by the authors of the Indian Codes.[1] Sir James Stephen, adopting a different classification, says—"All law may be sub-divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases. The Law of Evidence is that part of the Law of Procedure which with a view to ascertain individual rights and liabilities in particular cases decides: I, What facts may, and what may not be proved in such cases: II, What sort of evidence must be given of a fact which may be proven: III, By whom and in what manner the evidence must be produced by which any fact is to be proved."[2] According to this phraseology the Law of Procedure is what Bentham terms Adjective Law, and it includes (1) the Law of Pleading, which ascertains the questions in dispute between the parties; (2) the Law of Evidence which determines what facts may be proved, and how and by whom they are to be proved; and (3) rules for the conduct of the proceedings and for bringing before the Court the persons, documents and things, by which these facts are to be proved.

Misapprehensions as to the true use of rules of evidence.

§ 5. The real use and importance of rules of evidence have not always been clearly understood; and the value of such rules has been in consequence underrated by persons, who, owing to this misunderstanding, have expected these rules to accomplish impossible results, and have as a matter of course been disappointed. The exaggerated pretensions of the authors of

[1] Mr. (now, Sir James) Stephen's Speech—*Proceedings of the Legislative Council, March* 30, 1872.

[2] Page ix. of the Introduction to his *Digest of the Law of Evidence*, 1876.

certain systems, who have aspired at the complete discovery of truth (and, as might have been expected, have failed), have also done much to create dislike and distrust of any rules whatever on the subject. Archbishop Whately has shown that most of the complaints made against Logic are due to similar causes: and it may be observed that each system in its turn has been expected to accomplish what properly falls within the province of the other. It has been objected against *Logic*, for example, that it leaves untouched the greatest difficulties, and those which are the sources of the chief errors in reasoning, *viz.* the ambiguity or indistinctness of terms, and the doubts respecting the degrees of evidence in various propositions,—an objection which is not to be removed by any such attempt as that of Watts to lay down "rules for forming clear ideas," and "for guiding the judgment"; but by replying that no art is to be censured for not teaching more than falls within its province and, indeed, more than can be taught by any conceivable art. Such a system of universal knowledge as should instruct us in the full meaning or meanings of every term, and the truth or falsity, certainty or uncertainty, of every proposition, thus superseding all other studies, it is most unphilosophical to expect or even to imagine. And to find fault with Logic for nor performiug this, is as if one should object to the science of optics for not giving sight to the blind; or as if one should complain of a reading-glass for being of no service to a person who had never learned to read. In fact, the difficulties and errors above alluded to are not in the process of reasoning itself (which alone is the appropriate province of Logic), but in the subject-matter about which it is employed.[1]

Where rules of evidence will not assist.

§ 6. Similarly, there are two problems, and those by far the most important of any which a Judge has to solve, upon which rules of evidence throw no light at

[1] *Whately's Logic*—Introduction, § 5.

all, and on which they are not intended to throw any light. No rule of evidence that ever was framed will assist a Judge in the very smallest degree in determining the essential question—whether and how far he ought to believe what the witnesses say? Again, rules of evidence throw no light on a further question of equal importance which belongs to the domain, not of Evidence, but of Logic—what inference ought the Judge to draw from the facts which he believes to have been proved? In every judicial proceeding whatever, these two essential questions—Is this true? and, if it is true, what then? ought to be constantly present to the mind of the Judge; but the rules of evidence do not throw the smallest portion of light upon either of them; and persons who are absolutely ignorant of those rules may occasionally give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. A more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded and which are merely a particular application of the vulgar error which in so many instances leads people to deprecate art in comparison with nature: as if there were any opposition between the two, and as if true art did not pre-suppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see, if he be wholly lame or blind: so the best rules of evidence will not supply the place of natural sagacity or logical faculty; but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as aids to the feet and to the eyes.[1]

[1] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871. In the *Principles of Judicial Evidence* which he subsequently published as an Introduction to the Evidence Act, he further says:—"The natural and acquired shrewdness and experience, by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a Judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence.

§ 7. The objection against rules of evidence, namely, that they are useless, inasmuch as it is possible without any such rules to try cases and adjudicate correctly, seeing that men in the ordinary concerns of life, without any such rules to guide them, act with safety upon the statements of others and discover with sufficient certainty those facts which ought to influence their conduct, may be compared to the popular objection made against Logic, that men may reason very well who know nothing of it. Now, in every instance in which we *reason*, a certain process takes place in the mind which is one and the same in all cases. Many persons are not even conscious of this process in their own minds much less competent to explain the principles on which it proceeds.[1] This indeed is, and cannot but be, the case with every other process respecting which any system has been formed; the prac-

Objection against such rules considered.

No trial ever occurs in which the exercise of this faculty is not required; but it is only in exceptional cases that questions arise which present any legal difficulty, or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and give the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments, he will have great difficulty in finding any good reason for believing one man rather than another. The rules of evidence may provide tests, the value of which has been proved by long experience, by which judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections; but they do not profess to enable the judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power, and the practical experience of the judge, not upon his acquaintance with the Law of Evidence."

[1] Just as of the many millions on the face of the globe capable of *walking*, but few can explain the exquisite machinery of the human frame which enables the biped by the exercise of the will to progress, to recede, to go sideways at any angle, and to turn round.

tice not only *may* exist independently of the theory, but must have preceded the theory. There must have been language before a system of grammar could be devised; and musical compositions previous to the science of music. This shows the futility of the objections above referred to. The parallel instances adduced show that similar objections might be applied in many other cases, where their absurdity would be obvious; and there is no ground for deciding thence that system has no tendency to improve practice.[1] A rightly-formed system does not cramp the natural powers, but assists them.

Real use of Rules of Evidence.

§ 8. In addition to what has been just said, the real use and importance of rules of evidence will be further shown by the following considerations.[2] Those systems, which, like the French, dispense with all rules of evidence, obtain no other result from the want of them than floods of irrelevant gossip and collateral questions sufficient to confuse the strongest head and distract the most attentive mind. This will be readily intelligible to any one who has been present at the proceedings of an ordinary Court of Criminal Justice, where English rules of evidence are followed, and at the pro-

[1] See *Whately's Logic*, Book I. § 1.

[2] "A youthful Achilles," says Archbishop Whately, "may acquire skill in hurling the javelin under the instruction of a Chiron, though the master may not be able to compete with the pupil in vigour of arm. * * * * It has been truly observed that 'genius begins where rules end.' But to infer from this, as some seem disposed to do, that in any department wherein genius can be displayed, rules must be useless, or useless to those who possess genius, is a very rash conclusion. What I have observed elsewhere concerning Logic, that "a knowledge of it serves to save a *waste* of ingenuity," holds good in many other departments also. In travelling through a country partially settled and explored, it is wise to make use of charts, and of high-roads with direction-posts, as far as these will serve our purpose, and to reserve the guidance of the compass or the stars for places where we have no other helps. In like manner we should avail ourselves of rules as far as we *can* receive assistance from them, knowing that there will always be sufficient scope for genius in points for which no rules can be given." *Whately's Rhetoric*, p. vi. of Preface. These remarks apply with equal if not greater force to rules of evidence.

ceedings of a Court-Martial.[1] An ordinary Criminal Court never gets very far from the point, but a Court-Martial continually wanders into questions far remote from those which it is assembled to try.[2] A necessary consequence of the introduction of collateral and irrelevant questions is to prolong and extend the proceedings to an inconvenient and useless extent. On the other hand, the practical effect of rules of evidence, as shown by their operation in English Courts of Justice, is to exclude collateral and irrelevant matters, and so to shorten the proceedings, while attention is concentrated upon those points which are of essential importance. Having regard to the average of judicial ability, all Judges could not be expected to know how to set the same reasonable limits to the enquiries in which they may be engaged, yet without proper limits an incalculable waste of time and energy and a great weakening of the authority of the Court are sure to follow.[3] These evils are wholly prevented or to a great extent obviated by proper rules of evidence. Such rules are also of pre-eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty.[4] This consideration is especially valuable when applied to India, where many judicial officers have had no previous professional training, and where in too many Mufassil Courts no assistance is derivable from a trained Bar.

Their value as Tests of Truth.

§ 9. Rules of evidence are further of peculiar value to the Judge as furnishing him with solid tests of truth;[5] and this they do, not (as certain continental systems aspire

[1] The case of the monk Leotade, the affair of St. Cyr, and the case of François Lesnier given at the end of Mr. Stephen's "General View of the Criminal Law of England," afford at once instances and proof of this.

[2] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871. See also some excellent remarks on Courts-Martial, in Warren's Law Studies, Vol. II. p. 1023. The Indian Evidence Act applies to Courts-Martial, see s. 1.

[3] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871.

[4] *Idem.*

[5] *Idem.*

to do) by constituting a scientific machinery by which truth as to facts and as to men's actions can be ascertained somewhat as physical truths can be ascertained by the processes in use among men of science;[1] but by supplying negative tests, warranted by long and varied experience, as to two great points,[2] namely—the relevancy of facts to the question to be decided by the Court; and the sort of evidence by which particular facts ought to be proved. They may, in the broadest and most popular form, be stated thus :—If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims :—*First,* if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes—*Secondly,* never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have

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[1] Mr. Maine's Speech—*Proceedings of the Legislative Council, December* 12, 1868.

[2] Elsewhere in his speech Mr. Stephen says,—" A Law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of inquiring into the truth as to controverted questions of fact." Those who would dispense with all rules of evidence would do well to remember that the experience of an individual is but a small drop in the sea of the added experiences of all the individuals who have followed any profession or pursuit from the beginning. As to whether rules of evidence could be abolished even by express enactment of the Legislature, Mr. Stephen forcibly remarked as follows :—" There is a sense in which it may be said with perfect truth that even Legislative power is unequal to the task of abolishing rules of evidence. No doubt, it is competent to the Legislature to provide that no rules of evidence shall have the force of law ; but, unless they expressly forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss), the Judges infallibly will hear, and will be guided by, arguments upon the subject, and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic and inconvenient of all conceivable shapes."

before you the best evidence that is to be had : that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes ; if it was a thing said, have before you some one who heard it said with his own ears ; if it was a written paper, have the paper before you and read it for yourself."[1]

Proof of the utility of such rules drawn from India.

§ 10. The history of the administration of justice in India furnishes conclusive proof of the utility of rules of evidence and the necessity for some such rules in order to the success of a judicial system, however well constituted otherwise. Unfettered by any rules or restraints, the Courts away from the Presidency towns became each a law unto itself. The reports of cases, decided in appeal by the old Sàdr Courts and by the High Courts for some years after they were established, furnish ample proof of the evils and of the occasional injustice which were the result ; and the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from India.[2]

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[1] Mr. Stephen's speech—*Proceedings of the Legislative Council, April* 18, 1871.

[2] See para. 14, Civil Circular Order No. 9 of the Calcutta High Court dated 26th February, 1867, page 189, Vol. I of the Author's Edition of the "General Rules and Circular Orders ;" and the case of *Banwari Lal* v. *Hetnarain Singh*, before the Privy Council on the 22nd February, 1858, in which Dr. Lushington remarked ;—"It is unfortunately too much the habit of those Courts to receive documents without that just discrimination which would prevail, *were the rules of evidence known and established ;* but their Lordships are of opinion that they cannot in these cases take upon themselves to determine what ought or ought not to have been received in the Courts in India. They may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, *because the administration of justice was not more strictly conducted with reference to the admission of evidence.*"

In another case the following observations were made ;—"Objections have been taken to the admissibility of this document as evidence, and it has been contended to be a copy of a copy. With regard to the admissibility of evidence in the Native Courts in India, we think that no strict rule can be prescribed. However highly we may value rules of evidence

§ 11. A brief history of the law of evidence in India previous to the passing of the Evidence Act will form an appropriate Introduction to the Act itself. Within the Presidency towns, in the Courts established by Royal Charter, the English rules of evidence have always been followed. So much of these rules as were contained in the Common and Statute Law which prevailed in England before 1726 were introduced by the Charter of that year. Some few were to be found in subsequent Statutes expressly extended to India;

History of the Law of Evidence in India.

Courts established by Royal Charter.

as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in the East Indies, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals. We must look to their practice—we must look to the essential justice of the case—and not hastily reject any evidence because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and, more especially, where we find that it has been the practice of the Courts to receive documentary evidence without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing must inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this case, but almost in every other. Looking through the whole of these papers, we see that, both on the side of appellant and respondents, copies of documents coming out of a public office have been received upon the certificate that they were true copies, signed by the officer in the charge of that department, and that, whether produced by the plaintiff or the defendant in the cause. We entertain no doubt, therefore, that this document must be received in evidence; but what weight is to be ascribed to it still remains to be considered."—*Unidi Rajaha Raje Venkataperumal Rauze Bahádúr* v. *Pemmasami Venkatadry Naidú and others*, 7 Moo. Ind. Ap. 128. The rule here allowed was followed later in the case of *Ajodhya Persad Singh and another* v. *Amrao Singh and others*, (6 B. L. R. 509) where the testimony of a trustworthy witness, that a person was to his knowledge *reputed* insane, was held to be an important corroboration of the direct testimony given to the fact of that person's insanity at the time, though perhaps such evidence might not have been receivable at a trial in a Court of Justice in England. Now however that a Code of Evidence has been enacted for India, it is improbable that the highest tribunal will sanction any laxity, which involves a violation of the rules of that Code.

while others, again, have no greater authority than that of use and custom—"*cursus curiæ est lex curiæ.*" Part of these rules consisted of those restrictions on the admissibility of evidence, which Mr. Bentham attacked with such force at the commencement of the present century, and which have since been swept away under the enlightened auspices of Lord Denman, Lord Brougham, and others. India was not behind hand, in the introduction of the reforms thus carried out in England. Act XIX of 1837 abolished incompetency by reason of a conviction for a criminal offence; and Section 1, Act IX of 1840 extended to Her Majesty's Courts of Justice in India the provisions of the 3rd and 4th Will. IV. cap. 92, as to interested witnesses. In 1843 Lord Denman's Act (6 and 7 Vict. cap. 85) was passed, which enacted that no person offered as a witness should be excluded, by reason of *incapacity from crime* or interest, from giving evidence either in person or by deposition: and the following year Act VII of 1844 introduced similar provisions, applicable to Her Majesty's Courts in the Presidency towns. In 1846 the Statute 9 and 10 Vict. cap. 95, first declared *parties to the proceeding, their wives and all other persons* competent as witnesses in the County Courts; and in 1851 Lord Brougham's Act (14 and 15 Vict. cap. 99) was passed, which declared the parties and the persons in whose behalf any suit, action, or proceeding might be brought or defended, competent and compellable to give evidence in any Court of Justice or before any person having by law or by consent or parties, authority to hear, receive and examine evidence. Similar provisions were enacted for Her Majesty's Courts in India by Act XV of 1852. The Evidence Amendment Act of 1853 (16 and 17 Vict. cap. 83, introduced by Lord Brougham) made the husbands and wives of parties to the record competent and compellable as witnesses: and the same reform was introduced into India by Act II of 1855.

Courts not established by Royal Charter.

§ 12. For the Courts outside the Presidency towns and not established by Royal Charter, no complete set of rules of evidence were ever laid down or introduced by

authority. There were, indeed, a few occasional directions, half as to procedure, half as to evidence, to be met with in the old Regulations; and some few rules embodying the most striking reforms, then recently introduced in England, were inserted in Act XIX of 1853, the operation of which was, however, restricted to the Bengal Presidency. Two years afterwards, Act II of 1855 was passed. This Act reproduced with some additions all the reforms advocated by Mr. Bentham, and carried out in England by Lords Denham and Brougham; but nearly all its provisions pre-supposed the existence of that body of law, upon which these reforms and amendments were engrafted; and yet it was authoritatively laid down that the English law of evidence was not the law in the Mufassil.[1] It was also further decided that the rules of evidence to be

[1] By a Full Bench of the Calcutta High Court in the case of the *Queen* v. *Khyrula and others* (6 W. R. Crim. Rul. 21). Peacock (C. J.) said:—"It is clear that the English Criminal Law was not the Criminal Law of the Mufassil, and that *the English Law of Evidence was never extended by any Regulation of Government to criminal trials there*. * * * The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the law of the country. * * * A Code of Evidence has not yet been passed, and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration. By the abolition of the Mahomedan law, *the law of England was not established in its place*. * * * In the case of European British subjects, who are governed by the law of England we must administer that law. But *in the Mufassil, where the law of England is not the law of the Country, &c.*"

The state of the case was thus summarized by the Commissioners, appointed to prepare a body of substantive law for India, in their Report presented to Her Majesty:—"India does not at present possess an uniform law upon this subject. *Within the Presidency towns the English Law of Evidence is in force*, modified by certain Acts of the Indian Legislature, of which Act II of 1855 is the most important. This Act contains many valuable provisions. It extends the range of judicial notice, and facilitates the proof of documents, of foreign systems of law, and of matters of public history. It removes *incompetency* to testify by reason of interest or relationship; renders *parties to suits* liable to be called as witnesses, and makes *husband and wife* competent witnesses for or against each other in Civil proceedings; renders dying declarations admissible, though the declarant may have entertained hopes of recovery; provides that witnesses may be cross-examined by the party who called them, and that they shall not be excused from answering questions because they may thereby criminate themselves. Declarations which were against the *pecuniary interest* of the persons who made them, and entries according to the usual course of business,

found in Hindu and Mahomedan law were not binding on Mufassil Courts.[1]

Real state of the case.

§ 13. The real state of the case would then seem to have been this:—All admitted that the Mahomedan law of evidence was not to be followed. The *whole* of the English law of evidence had never by any general enactment been rendered applicable to India, though some portions of it, in a modified shape or otherwise, had been expressly incorporated in the Statute Law of this country—Act II of 1855 being the largest entire specimen of this fragmentary legislation, while other fragments were to be found scattered through the Statute Book, more especially in the Codes of Civil and Criminal Procedure. Where the Statute Law was silent, it devolved upon the higher Courts to supply the deficiency with case-made law, from which, as is well known, nearly the whole of the English unwritten code has been constructed. In laying down precedents and

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both of which kinds of evidence the English law admits only in case of death are under this Act admissible if the person who made the declaration or the entry has become incapable of giving evidence, or if his testimony cannot be procured. The Act also gives to *books regularly kept*, and to certain commercial documents, the character of corroborative though not of independent evidence, and makes entries in such books independent evidence of certain formal matters; it extends the class of persons whose declarations are admissible in cases of pedigree, and provides in effect that mistakes committed in the rejection or reception of evidence shall not lead to a new trial or to the reversal of a decision unless a substantial failure of justice has been caused thereby. *The Act, however, bears reference in many places to the existing law, and it appears to have been designed, not as a complete body of rules, but as supplementary to and corrective of the English law, and also of the customary law of evidence prevailing in those parts of British India where the English law is not administered.* This customary law has not assumed any definite form; the Mahomedan law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the country Courts, even in criminal matters; and those Courts have in fact no fixed rules of evidence except those contained in Act II of 1855. *They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable.*"

[1] See extract from the Full Bench decision in the last Note; and Arbuthnot's Select Reports (Madras,) Preface, p. 27.

settling disputed points, these higher Courts carefully considered the different systems in force in different countries, the former usage in India (if any), the peculiar circumstances of the country, and their modifying effect on principles of general application; and where, with due regard to these considerations, they found themselves able to follow the English law of evidence, they were generally willing to take it as their *guide*. The whole of the Indian law of evidence might then have been divided into *three* portions, *viz.* one portion *settled* by the express enactments of the Legislature; a second portion *settled* by judicial decision; and a third or *unsettled* portion, and this by far the largest of the three, which remained to be incorporated with either of the preceding portions.

§ 14. On introducing the Draft Bill[1] drawn up by Her Majesty's Commissioners, Mr. Maine,[2] who was then the Legal Member of Council, after quoting the observations made by the Commissioners in their Report, proceeded to remark as follows:—"During the last ten or fifteen years the doctrine that the English law of evidence was *vi propriâ* in force throughout the whole of the country has certainly gained strength, and the habit of applying that law with increasing strictness is gaining ground. No doubt much evidence is received

Unsatisfactory state of the Law.

[1] This Bill never got beyond the first reading. It was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted, to be unsuitable to the wants of the country. The chief objection to it was that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England which could scarcely be expected from them. Mr. Stephen spoke thus of it in Council:—"I may observe in general, however, that the principal reasons were that the Bill was not sufficiently elementary, that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English handbooks with the English law upon this subject. The Commissioners' draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English law."

[2] Now Sir Henry Sumner Maine.

by the Mufassil Courts which the English Courts would not regard as strictly admissible. But I would appeal to Members of Council who have had more experience in the Mufassil than myself, whether the Judges of those Courts do not as a matter of fact believe that it is their duty to administer the English law of evidence as modified by the Evidence Acts. In particular, I am informed that when a case is argued by a barrister before a Mufassil Judge, and when the English rules of evidence are pressed on his attention, he does practically accept those rules, and admit or reject evidence according to his construction of them. I cannot help regarding this state of things as eminently unsatisfactory. I entirely agree with the Commissioners that there are parts of the English law of evidence which are not suited to this country. We have heard much of the laxity with which evidence is admitted in the Mufassil Courts, but the truth is that this laxity is to a considerable extent justifiable. The evil, it appears to me, lies less in admitting evidence which under strict rules of admissibility should be rejected, than in admitting and rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of the law of evidence is an evil, but it would be an equal, or perhaps even a greater, evil that such strict rules of evidence should be enforced as practically to leave the Court without the materials for a decision. I would venture to state my impression that the fault of substance ordinarily committed by the Mufassil Courts consists less in lax admission of evidence than in averting their attention from the evidence really before them, and in conjecturing the facts of the case upon probabilities derived from a consideration of what the Natives of this country would be likely to do under given circumstances.[1] Another objection lies in the necessity which the Mufassil Judges are thus placed under of depending upon English text-books. There are excellent

[1] The Author can add the testimony of his experience to the truth of the above remarks.

text-books of the English law of evidence, but their usefulness consists more in refreshing knowledge which has been gained by forensic experience than in teaching knowledge. The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India is a liberalized version of the English Law of Evidence, enacted with authority, and thus excluding caprice, and superseding the use of text-books by compactness and precision." [1]

English Law practically followed.

§ 15. More than two years after, Mr. Stephen (Mr. Maine's successor) when introducing the Bill which has since become law, with not less truth expressed himself thus:— "It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English law of evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for if the English law of evidence has not been introduced into this country, English lawyers and quasi-layers have; and they have been directed to decide according to the law of justice, equity, and good conscience. Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered,—a good deal may be said for unaided mother-wit and natural shrewdness; but a half-and-half system, in which a vast body of half-understood law, totally destitute of arrangement, and of uncertain authority, maintains

[1] *Proceedings of the Legislative Council of 12th December*, 1868.

a dead-alive existence, is a state of things which it is by no means easy to praise." [1]

§ 16. It will readily be conceived that the necessity for legislation was admitted, when the unsatisfactory state of things above described came to be fully realized. It being then resolved to prepare a Code of Evidence for India, the question arose—"What system was to be taken as the model for this Code?" Her Majesty's Commissioners, when presenting the Bill drawn up by them, made in their report the following remarks on this point:—"In laying down uniform rules for the guidance of the Indian Judges in general, as well in the Courts just mentioned as in those in which the English law of evidence has hitherto prevailed, we do not think that it would be advisable to adopt a system so artificial as that which has grown up in this country. The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure; and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India. In England the aim has been to avoid presenting to the consideration of the jury whatever it was thought could not safely be presented to an unprofessional tribunal. In order to obtain this end, various kinds of evidence, which were deemed little worthy of credit, were pronounced inadmissible, and a great deal of evidence which, if duly weighed and dispassionately considered, would tend to the elucidation of truth is absolutely excluded. * * * * * In a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all Civil and in some Criminal cases to decide without a jury, there is a greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it. It seems, therefore, better to afford every facility for the admis-

English Law of Evidence in its entirety not suited to India.

[1] *Proceedings of the Legislative Council of 18th April*, 1871.

sion of truth, although with some risk that falsehood or error may be mixed with it, than to narrow, with a view to the exclusion of falsehood, the channels by which truth is admitted."

The First Bill.

§ 17. Believing that the English law of evidence contained the most excellent rules derived from the most valuable experience, the Commissioners while omitting all that appeared to them unsuited to India, endeavoured to adapt the rest to the peculiar requirements of the administration of justice as above described. The Draft Bill prepared by Her Majesty's Commissioners did not, however, meet with approval in India. The Select Committee of the Legislative Council, to whom it was referred for report, after a very careful consideration of the Draft, arrived at the conclusion that it was not suited to the wants of the country. The grounds on which this conclusion was based were, "in a few words, that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England, which could scarcely be expected from them."

The Second Bill.

§ 18. The Select Committee accordingly proceeded under the auspices and guidance of Mr. (now Sir James) Stephen to prepare a new Bill, as to which they thus speak in their report:—

Evidence Act based on English Law of Evidence modified to suit India.

"In general, it has been our object to reproduce the English "Law of Evidence with certain modi- "fications, most of which have been "suggested by the Commissioners, "though with some this is not the case. The English Law "of Evidence appears to us to be totally destitute of arrange- "ment. This arises partly from the circumstance that its "leading terms are continually used in different senses, and "partly from the circumstance that the Law of Evidence was "formed by degrees out of various elements, and in particular "out of the English system of pleading and the habitual prac-

"tice of the Courts of Common Law[1]. For instance, the "rule that evidence must be confined to points in issue is "founded on the system of pleading. The rule that hearsay "is no evidence is part of the practice of the Courts; but "the two sets of rules run into each other in such an "irregular way as to produce between them a result which "no one can possibly understand systematically, unless he "is both acquainted with the principles of a system of "pleading which is being rapidly abolished, and with the "every-day practice of the Common Law Courts, which "can be acquired and understood only by those who ha- "bitually take part in it. This knowledge, moreover, must "be qualified by a study of text-books, which are seldom "systematically arranged. Many other circumstances, to "which we need not refer, have contributed largely to "the general result; but we may illustrate the extreme "intricacy of the law, and the total absence of anything "like system which pervades every part of it, by a single "instance. In Mr. Pitt Taylor's work on Evidence, it is "stated that 'ancient documents, when tendered in sup- "port of ancient possession,' form the third exception to "the rule which excludes hearsay. The question is whe- "ther A is entitled to a fishery. He produces a Royal "grant of the fishery to his ancestor. This fact the law "describes as a peculiar kind of hearsay admissible by "special exception. Surely this is using language in a "most uninstructive manner. This being the case, we "have discarded altogether the phraseology in which the "English text-writers usually express themselves, and "have attempted first to ascertain, and then to arrange in "their natural order, the principles which underlie the "numerous cases and fragmentary rules which they have "collected together. The result is as follows:—

[1] Mr. Maine said that the English law of evidence would probably never have come into existence but for one peculiarity of the English judicial administration—the separation of the Judge of law from the Judge of fact, of the Judge from the Jury.—*Proceedings of the Legislative Council of 12th December*, 1868.

On what principles constructed.

§ 19. "Every judicial proceeding whatever has for its "purpose the ascertaining of some "right or liability. If the proceeding "is criminal, the object is to ascertain "the liability to punishment of the person accused; if the "proceeding is civil, the object is to ascertain some right "of property or of status, or the right of one party, and "the liability of the other, to some form of relief. All "rights and liabilities are dependent upon and arise out of "facts, and facts fall into two classes, those which can, and "those which cannot, be perceived by the senses.[1] Of "facts which can be perceived by the senses, it is super-"fluous to give examples. Of facts which cannot be per-"ceived by the senses, intention, fraud, good faith, and "knowledge may be given as examples. But each class "of facts has, in common, one element which entitles them "to the name of facts—they can be directly perceived "either with or without the intervention of the senses. "A man can testify to the fact that, at a certain time, he "had a certain intention, on the same ground as that on "which he can testify that, at a certain time and place, he "saw a particular man. He has, in each case, a present "recollection of a past direct perception. Moreover, it is "equally necessary to ascertain facts of each class in "judicial proceedings, and they must in most cases be "ascertained in precisely the same way.

Relation of Facts to Rights and Liabilities.

§ 20. "Facts may be related to rights and liabilities in "one of two different ways. (1) "They may by themselves, or in con-"nection with other facts constitute "such a state of things that the existence of the dis-"puted right or liability would be a legal inference from "them. From the fact that A is the eldest son of B, there "arises of necessity the inference that A is by the law of "England the heir-at-law of B, and that he has such "rights as that status involves. From the fact that A

[1] See Chapter II of the Introduction to Mr. Stephen's Indian Evidence Act.

"caused the death of B under certain circumstances, and "with a certain intention or knowledge, there arises of "necessity the inference that A murdered B, and is liable "to the punishment provided by law for murder. Facts "thus related to a proceeding may be called facts in issue, "unless, indeed, their existence is undisputed. (2) Facts, "which are not themselves in issue in the sense above ex- "plained, may affect the probability of the existence of "facts in issue, and these may be called *collateral facts*. "It appears to us that these two classes comprise all the "facts with which it can in any event be necessary for "Courts of Justice to concern themselves, so that this classi- "fication exhausts all facts considered in their relation to the "proceeding in which they are to be proved.

§ 21. "This introduces the question of proof. It is "obvious that, whether an alleged "fact is a fact in issue or a collateral "fact, the Court can draw no infer- "ence from its existence till it believes it to exist; and it is "also obvious that the belief of the Court in the existence "of a given fact ought to proceed upon grounds altogether "independent of the relation of the fact to the object and "nature of the proceeding in which its existence is to be "determined. The question is, whether A wrote a letter. "The letter may have contained the terms of a contract; "it may have been a libel; it may have constituted the "motive for the commission of a crime by B; it may supply "proof of an *alibi* in favour of A; it may be an admission "or a confession of crime;—but whatever may be the rela- "tion of the fact to the proceeding, the Court cannot act "upon it unless it believes that A did write the letter, and "that belief must obviously be produced, in each of the cases "mentioned, by the same or similar means. If, for instance, "the Court requires the production of the original when the "writing of the letter is a crime, there can be no reason why "it should be satisfied with a copy when the writing of the "letter is a motive for a crime. In short, the way in which

Question of Proof considered.

"a fact should be proved depends on the nature of the fact, "and not on the relation of the fact to the proceeding.

Evidence—What.

§ 22. "The instrument by which the Court is convinced "of a fact is evidence. It is often "classified as being either direct or "circumstantial. We have not adopted this classification. "If the distinction is that direct evidence establishes a col- "lateral fact, evidence is classified, not with reference to its "essential qualities, but with reference to the use to which "it is put; as if paper were to be defined, not by reference "to its component elements, but as being used for writing "or for printing. We have shown that the mode in which "a fact must be proved depends on its nature, and not on the "use to be made of it. Evidence, therefore, should be de- "fined, not with reference to the nature of the fact which it "is to prove, but with reference to its own nature.

Cause of ambiguity in the use of the word "Evidence."

§ 23. "Sometimes the distinction is stated thus—Direct "evidence is a statement of what a "man has actually seen or heard— "Circumstantial evidence is some- "thing from which facts in issue are to be inferred. If the "phrase is thus used, the word, evidence in the two phrases "('direct *evidence*' and 'circumstantial *evidence*') opposed to "each other has two different meanings. In the first, it means "testimony; in the second, it means a fact which is to serve "as the foundation for an inference. It would, indeed, be "quite correct, if this view is taken, to say, 'Circumstantial "evidence must be proved by direct evidence.' This would "be a most clumsy mode of expression, but it shows the am- "biguity of the word 'evidence,' which means either [1]—(1) "words spoken or things produced in order to convince the

[1] Mr. Stephen said in his speech of ths 18th April, 1871:—"The main feature of the Bill consists in the distinction drawn by it *between the relevancy of facts and the mode of proving relevant facts.* The neglect of this distinction by English text-writers no doubt arises from the ambiguity of the word "evidence," and is the main cause of the extreme difficulty of understanding the English law of evidence systematically."

"Court of the existence of facts—or (2) facts of which the "Court is so convinced, which suggest some inference as to "other facts. We use the word 'evidence' in the first of "these senses only, and so used it may be reduced to three "heads (1) Oral Evidence; (2) Documentary Evidence; (3) "Material Evidence. Finally, the evidence by which facts "are to be proved must be brought to the notice of the "Court and submitted to its judgment, and the Court must "form its judgment respecting them."

Skeleton of the Act.

§ 24. The following skeleton of the contents of the Act, as passed, will show how the subject has been distributed under the heads above indicated :—

PART I.—RELEVANCY OF FACTS.

Chapter I.—Preliminary Definitions.

Chapter II.—Of the Relevancy of Facts.

PART II.—ON PROOF.

Chapter III.—Facts which need not be proved.

Chapter IV.—Of Oral Evidence.

Chapter V.—Of Documentary Evidence.

Chapter VI.—Of the exclusion of Oral by Documentary Evidence.

PART III.—PRODUCTION AND EFFECT OF EVIDENCE.

Chapter VII.—Of the Burden of Proof.

Chapter VIII.—Estoppel.

Chapter IX.—Of Witnesses.

Chapter X.—Of the Examination of Witnesses.

Chapter XI.—Of improper Admission and Rejection of Evidence.

Distinction between functions of a Judge in India and in England.

§ 25. We have seen that Her Majesty's Commissioners recognized an important distinction between the functions of a Judge in England and the functions of a Judge in India. In the latter country a Judge is in all Civil cases, and in the majority of Criminal cases, judge both of fact and of law. The Select Committee did not lose

sight of this very important distinction in preparing their Bill, as will appear from the following remarks of Mr. Stephen :—

"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—*the Judge has to conduct the whole trial himself.* In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him, but to enquire to the utmost into the truth of the matter.[1] We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."[2]

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[1] The Bill was subsequently somewhat modified in this respect; but see section 165, *post*.

[2] The following Note taken from the first edition of this work is still important in connection with the above remarks :—The task of a Judge is much easier in an English than in an Indian Court of law. In England the

§ 26. Having given a sketch of the history of the Law of Evidence in India, and some description of the principles which have been followed in framing the Act, by

Object of the remaining portion of this Introduction.

parties or their Counsel fix the issues, and decide what evidence they will produce thereupon. In India the Judge selects the issues, because there are no Counsel competent to do so. This one duty, thrown of necessity on Indian Judges, renders *Mufassil experience a sine quâ non* for the Mufassil Bench. The duty of the Judge in the settlement of issues was discussed by the Calcutta High Court in the case of *Jashoda Kanwar, Petitioner*, v. *Babu Gauri Beijnath Persad*, (1 Jurist, 365), in which it was held that the client is not bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge. The following extract from this decision is important:—

"But, then, it is said, that the appellant's pleader having given his consent "to these issues, she is bound by his act, and may not contend that those "issues were erroneous. This argument, however, in my opinion, assumes for "pleaders in the Mufassil Courts of this country an authority which they do "not possess, and with which it would not be safe to invest them, and which, "moreover, as we shall show, is not contemplated by the law of procedure in "India. In England, no doubt, the law is that parties are bound not merely by "admissions but by the view taken of their cases, and the mode of conducting "them by their counsel at the trial. The mode in which issues are to be "framed is to be found in Sections 139 to 141, (*i. e.* of Act VIII of "1859) which clearly show that this is exclusively the function of the "Court. Section 139 declares that the Court may frame the issues from "the allegations of fact which it collects from the oral examination of "the parties or their pleaders, notwithstanding any difference, &c. *This "clearly shows that the pleader may bind his client by a statement of matters "of fact, but nothing is said of issues or admissions of law.*" (See now Sections 146-148 of Act X of 1877.)

"The only cases in which the issues are not directly framed by the Court are "those provided for by Sections 142 and 143. In those cases, issues may be "tendered to the Court under a solemn agreement between *the parties* in writ"ing, by which they bind themselves to act according to the finding of the "Court upon such issues, and the Court, if it be satisfied that the *parties* have "so agreed, and that the question is *fit to be tried* (still retaining a control over "the frame of the issue), may proceed to determine the same. There was no "agreement of the sort here, and the responsibility of the issues lay wholly on "the Court." (See now Sections 150-151 of Act X of 1877.)

"In the Mufassil Courts, no doubt, particular acts done within the con"ditions of the *vakalatnama* and admissions of "fact by the pleader, are binding on the client,* "but we cannot hold that the client is bound "by the mistaken consent of his pleader to abide by issues of law erro"neously framed by the Judge, and not properly arising in the case.

* See cases cited in Macpherson's Civil Procedure, 4th Edition, page 209, Notes A. and C.

which the Courts in India are henceforth to be guided in dealing with evidence, I leave the details of the measure to

"There is but a slight analogy between a barrister in English Courts of Jus-
"tice and a Mufassil pleader. The former is usually entrusted with the conduct
"of a case (through an attorney) by reason of his learning and ability: he is
"responsible to the Court and to the profession of which he is a member for
"his professional conduct, and he has well-known privileges and immunities.
"The *vakil* is simply the representative of the suitor, possessed of his personal
"confidence and in direct communication with him, but having neither in
"theory nor in fact the learning and the varied experience of the English
"barrister.

"The pleader is presumably well acquainted with the facts of the case in
"which he is employed, and he is bound to an honest care for his client's in-
"terest; but, although of late years efforts have been made to ensure his
"having a rudimentary knowledge of the law, it is certain that those efforts
"have been only partially successful, and especially that no rule of practice
"can be laid down which is based on the presumed legal science of the Mu-
"fassil practitioner. I say Mufassil practitioner, because these observations are
"not meant to apply to the native Bar in the Appellate High Court, nor do
"I deny that there are honourable exceptions even in the interior; but any
"one who is at all acquainted with the Mufassil Courts is aware that, generally
"speaking, the possession of the commonest text-books by pleaders there is quite
"exceptional; it might be possible to find some who are not even possessed of
"Act VIII itself. And very mainly, no doubt for this reason, the Legislature
"has in the Code of Civil Procedure *imposed upon the Courts themselves the*
"*responsibility of conducting suits in every stage*—emphatically so, as to the
"framing of issues, which, under the present as well as the former procedure,
"is exclusively the business of the Court."

A party is bound by an admission of a *fact* made by his vakil—see *Khajah Abdut Ganni* v. *Gaur Mani Debya*, 9 W. R. 375; *Gaur Narain Rai* v. *Srinath Mitter and others*, 9 W. R. 485; *Kali Kanund Bhattacharjya* v. *Girinbala Debya and others*, 10 W. R. 322; *Matadi Rai* v. *Madhu Sudhan Singh and others*, 10 W. R. 293; *Srimati Dasi* v. *Petambhar Pandah*, 21 W. R. 332; *Rajendra Narain Rai and Mohendro Narain Rai* v. *Bijai Gobind Singh*, 2 Moo. In. Ap. 253. A vakil employed to conduct a case has no implied authority to compromise it. There must be an express clause in his *vakálatnama* giving him authority to compromise, otherwise a compromise made by him will not be binding upon his client—*Prem Sukh* v. *Pirthi Ram and others*, 2 N.-W.-P. Rep. 222. In the case of *Ram Kúmar Rai and others*, v. *The Collector of Bírbhúm and others*, (5 W. R. Civ. Rul. 81) it was *held* that a *vakálatnama*, which was broad and general in its terms and empowered the pleader to act and take any steps in the case, was *primâ facie* a sufficient authority for an application by the pleader to withdraw from the suit (under s. 97, Act VIII of 1859) with leave to sue again on the same cause of action, and that the client was bound by the order

be gathered from the study of the Act itself, and I trust that those Notes, by which I have endeavoured to make its provisions readily intelligible to those who have had no previous knowledge of the subject, will facilitate and assist this study. As this work is intended more especially for beginners,—for those who, without much previous training and without having practised as advocates, will be required to exercise judicial functions at an early age, when they must naturally be deficient in experience, one of the most valuable qualities in a judge—as well experience in a general sense, as also experience of a new country, a new people, a new language, and social and domestic habits quite different from those of the West,—I shall devote the remaining portion of this INTRODUCTION to some observations intended to assist the judi-

passed on this application; no application having been made to the Lower Court to set aside the order complained of, and there being nothing to show that the pleader had acted contrary to his instructions—there being also no allegation of fraud or misconduct on his part. Where a pleader, authorized to conduct the defence in the usual manner, pledged his client to relinquish his defence, if the plaintiff would assert on oath that the defendants were not the owners of the property in dispute, it was *held* that he had exceeded his powers and that his clients were not bound by his acts—*Mussamat Hakúnanissá* v. *Baldeo and others*, 5 N.-W.-P. Rep. 309. So also where, a case having been remanded by the High Court, a pleader gave up a part of the claim, having received no instructions to abandon such part—*Sheikh Abdúl Sabhan Chaudhri* v. *Sib Krishto Deo*, 8 B. L. R. Appen. 15.

In *Rumsey* v. *King* (33 L. T. Rep. N. S. 728) a client was held bound by a compromise entered into and announced in his presence by Counsel in open Court, although it was made contrary to his express prohibition, on the ground that a repudiation of Counsel's authority must be made openly and without delay or not at all. It has been decided that an attorney in the Courts of Common Law has general authority to compromise an action provided he acts *bonâ fide* and reasonably, and not in defiance of the direct and positive instructions of his client (*Pristwick* v. *Poley*, 18 C. B. N. S. 806: *Chown* v. *Parrot*, 14 C. B. N. S. 74: *Fray* v. *Voules* 1 El. and El. 839). In the Court of Chancery it was held otherwise (*Swinfen* v. *Swinfen*, 25 L. J. C. P. 303), but the question can scarcely be said to be settled. An attorney, authorised to appear for a party in an action, has authority to refer it to arbitration without any fresh authority to that effect (*Faviell* v. *Eastern Counties Railway Company*, 2 Exchcq. 344). The position of a Vakil thus differs widely from that of a Barrister or Solicitor.

cial officer in dealing with evidence in India. I am well aware that no positive rules can be laid down for guidance in this direction. The best aids are natural sagacity and experience. No amount of study can create these qualities; but, where they exist, they may be materially quickened and assisted by hints drawn from the sagacity and experience of others, who have antecedently laboured in the same field.[1]

Tests of the Credibility of Witnesses.

§ 27. "I suppose," said Archbishop Whately, "it will not be denied that the three following are among the most important points to be ascertained in deciding on the credibility of witnesses: *first*, whether they have the means of gaining correct information; *secondly*, whether they have any interest in concealing truth; and, *thirdly*, whether they agree in their testimony."[2] The two first of these tests are applicable to the witnesses individually: the third to the whole of the testimony taken together, to which a further and scarcely less important test also applies, namely, "is the evidence consistent with the usual and known principles of human action and with the common experience of mankind?" The value of this latter test depends upon the connexion usually found to exist between certain things and upon the supposition that there is a general uniformity both in natural events and in human conduct.

Is the evidence consistent with itself?

§ 28. Another test is the consistency or inconsistency of the evidence with itself. "The usual character of human testimony," says Dr. Paley, "is *substantial truth under*

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[1] "In *no* department can systems of art equalize men of different degrees of original ability and experience, or teach us to accomplish all that is aimed at. No system of agriculture can create land; nor can the Art Military teach us to produce, like Cadmus, armed soldiers out of the earth: though land and soldiers are as essential to the practice of these arts, as the well-known preliminary admonition in the Cookery Book, 'first take your carp,' is to the culinary art. Nor can all the books that ever were written bring to a level with a man of military genius and experience a person of ordinary ability who has never seen service."—*Whately's Rhetoric. Introduction*, § 4.

[2] *Historic Doubts relative to Napoleon Buonaparte*, p. 14, sixth edition.

circumstantial variety. This is what the daily experience of Courts of Justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the mind of the Judge. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud." If the reader has ever been present at some startling accident or other abnormal occurrence, and has afterwards talked over the incidents of the occasion with others who were also present, he will readily realize the truth of these remarks for himself. He has, no doubt, found that he observed some things which did not attract the attention of some of his fellow-observers, while some of them have seen matters which escaped his observation. The angle of view at which each observer stands, the objects that more or less intervene, the number of surrounding and distracting circumstances, and the difference between the powers of observation and keenness of sight of different individuals, together with other causes, will readily account for this *circumstantial variety*, while all are agreed about the broad incidents of the *substantial truth*. If such circumstantial variety is possible, where the attention has been roused and stimulated by an occurrence unusual and out of the ordinary routine of daily life, how much more must it be possible when there is nothing to rouse and stimulate the mind to more than ordinary attention! We find accordingly in the experience of every-day life that men, whom we know to be most truthful and honest, derive the most opposite impressions from the same sources of ideas. The reader can easily instruct himself by following out this train of thought, and can test these remarks by applying them to the ordinary incidents of his own life. Experience will thus convince him that a certain variety in detail accompanies and even indicates truth, while a close and minute agreement is significant of conspiracy and falsehood.

§ 29. There is, however, one kind of agreement which has been justly considered a strong indication of truth, *viz.* the agreement of *undesigned coincidences*. "Where several witnesses," says Mr. Starkie, "bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions—either the testimony is true, or the coincidences are the result of concert and conspiracy." To determine which is actually the case, there are two valuable tests: *First*, are the witnesses independent, and acting without concert? *Second*, are the coincidences natural and undesigned? If it clearly appear that the witnesses are independent and acting without concert, and if the coincidences in their testimony be too numerous to be the result of mere accident, there will be created a presumption in favour of truth, which will exist independently of the credit of the witnesses themselves for honesty and veracity. "It is manifest," says Archbishop Whately, "that the concurrent testimony, positive or negative, of several witnesses, when there can have been no concert, and especially when there is any rivalry or hostility between them, carries with it a weight independent of that which may belong to each of them considered separately. For though, in such a case, each of the witnesses should be even considered as wholly undeserving of credit, still the chances might be incalculable against their all agreeing in the *same* falsehood.[1]" "It deserves likewise to be attended to on this subject," says Dr. Campbell, "that in a number of concurrent testimonies (in cases wherein there could have been no previous concert), there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses—a probability which would remain even though the witnesses were of such a character as to merit no faith at all. This probability arises

Agreement of Undesigned Coincidences.

[1] *Whately's Rhetoric*, Part I. Chap. II, § 4.

purely from the concurrence itself. That such a concurrence should spring from chance is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no other cause but the reality of the fact." [1]

Concert between witnesses in India.

§ 30. In India,[2] even in the most true cases, there is generally more or less concert between the witnesses on the same side. Coming generally from the same village, and personally known to each other, they travel together on foot to the Court, which is occasionally more than one day's journey from their homes. Certain to beguile the tediousness of the way with conversation on the object of their journey, each tells all he knows for the benefit of the others. Arrived at the town or village where the Court is situate, they commonly lodge together, and together sit under the big trees[3] which surround the Court-house, waiting, it may be one day or several days, to have their testimony recorded, and still discoursing of what they have got to say and how to say it. Then the low *mukhtars*,[4] the unlicensed practitioners and case-mongers who infest every Court in India, are sure to warn the parties at whose instance the witnesses are about to be examined of the danger of letting them go before the *Hakim*[5] unprepared. As a natural result, the task of preparation is entrusted to these questionable advisers, and the witnesses are prepared by being drilled in the whole story, as gathered from the several accounts given by each—the *mukhtar* making such additions and improvements as to him seem advisable in order to render the whole evidence conformable to what in *his* opinion it should be, and impressing upon the witnesses the danger to the case if they should differ from each other in the smallest

[1] *Campbell's Philosophy of Rhetoric*, Chap. V, Book I, Part III, p. 125.

[2] These remarks apply more especially to the Bengal Presidency, in which the Author's experience has lain.

[3] Most *Kachahries* or Court-houses in India are surrounded with trees for purposes of shade.

[4] *Mukhtar*, literally 'chosen,' 'selected,' 'invested with power,' is a native agent or attorney.

[5] "Judge," "Magistrate."

particular. It will not be surprising that, under the circumstances just described, the witnesses on the same side commonly know the *whole* story with every detail and incident thereof, and tell that story in the same language and with the same sequence of particulars[1]; and that the *circumstantial variety*, which is so strong an indication of truth, is nowhere apparent. In England fraudulent concert and untruthfulness might safely be assumed; but such an assumption would be far from being a safe one in the majority of instances in India.

Mode of Testing concert between Indian witnesses.

§ 31. The Indian Judge or Magistrate, who is desirous of ascertaining whether such concert is or is not an indication of falsehood, should, instead of allowing the witnesses to tell their voluble tale in the language which has been put into their mouths, take them in hand himself or have them taken in hand by a competent pleader (if there is one engaged in the case), and by putting suitable questions elicit from them what they really know of their own knowledge.[2] When this course is adopted, the

[1] In a case which came before the Author when a Magistrate, *five* witnesses, describing an assault said to have been committed by *eleven* persons, each and all detailed the names of the eleven accused *in the same order*. It may safely be said that without concert this could not possibly happen. The *mukhtar* obtained a copy of the *complaint* made some days previously against the accused by name for the purpose of obtaining a summons: and, in order to guard effectually against discrepancy, he had made each of the five witnesses *commit it to memory*.

In the case of serious offences triable by Magistrates and which the Police are authorized to investigate, the *duty* of preparation is occasionally performed by the Police, especially if they be of the old school. In the case of the more serious offences triable by the Court of Session, the witnesses have usually been examined by the Police and by the Magistrate before they appear at Sessions, where their testimony is therefore likely to be unusually perfect.

[2] "The task of interrogation," says Mr. Norton, "requires much experience. The practice in the Company's Courts, I believe, is to allow the witness in the first instance to tell his own story and then for the Court and parties to found any questions they please upon his statement. *I prefer the plan of compelling a witness to answer questions in the first instance.* When the story is made up, it is evident that the witness has a much easier task in simply giving an uninterrupted narrative, than in delivering himself of it in such order as

witness is compelled to rely for his answers upon his own knowledge and memory instead of the story which he has learned by heart, and a little patience and care will soon enable the Judge or Magistrate to discover whether his testimony has been wholly invented or merely subjected to the process of preparation above described.

Are the coincidences Natural and Undesigned.

§ 32. Passing now to the second test for determining whether coincidences are the marks of truth or the result of concert and conspiracy, I cannot do better than quote Mr. Starkie, who writes thus:—"The nature of such coincidences is most important. Are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute or remote points,[1] which

his interrogator may choose. Time, too, is saved if the witness be compelled to answer succinctly the questions put to him, and he be not allowed to ramble into immaterial or impertinent statements"—§ 812. The Author has often found it convenient to let the *first* witness tell the story as prepared: and, where *second* and successive witnesses are evidently running off in the same groove, to take them in hand and interrogate.

In the case of *Ramgati* v. *Srimati Imitari Banú* (1. B. L. R. Short Notes xx), *Peacock*, C. J. said—"It was remarked by the Lords of the Judicial Committee of the Privy Council in a recent case, *Sarendra Nath Rai* v. *Hiramani Barmani* (1. B. L. R. P. C. 33)—'It is the great misfortune of Hindu 'litigants that their cases often fall in the earlier stages of litigation into the 'hands of incompetent advisers, who, by the mixture of falsehood with truth, 'or by the suppression or abandonment of part of a true case, from some 'mistaken views of policy or difficulty, create often impediments to its success 'from which the true story, if revealed, would have been free'—and I may add that it is another great misfortune of litigants in the Mufassil in this country, that the witnesses, who are called to prove the facts of the case, are not properly examined through the incompetency of those who have the management of the suits, and that the Judges do not make up for that incompetency by *themselves examining the witnesses* or exercising those powers for obtaining the truth with which they have been entrusted by the law of procedure. If the Munsif failed in the performance of his duty in that respect, the Principal Sádr Amín had the power under S. 355 of the Code of Civil Procedure to require further evidence."

[1] *Undesigned* testimony is manifestly so far the stronger, the suspicion of fabrication being thus precluded. Slight incidental hints, therefore, and oblique allusions to any fact have often much more weight than distinct formal assertions of it.—*Whately's Rhetoric*—Part I. Chap. II. § 4.

were not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration. Human cunning to a certain extent may fabricate coincidences even with regard to minute points, the more effectually to deceive, but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited. The witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved for fear of detection, and thus their testimony will not be even and consistent: but the witnesses of truth will be equally ready and equally copious upon all points." "It must always be borne in mind," says Mr. Taylor, "that in the actual occurrences of human life nothing is inconsistent. Every event which actually transpires has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with all others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed. In all this, perfect harmony prevails, so that a man can hardly invent a story, which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false." It is in fact as difficult to make a lie fit in with all the surrounding circumstances to which it must be adapted, as it is to fill up a hole made in the middle of a web of cloth so that no traces of the joining may be visible. It is impossible to take the threads of the warp and the woof and weave the rent or aperture over. It must needs be darned or patched, and the cleverest darning or the most skilful patchwork will show.

§ 33. We now come to the important test—is the evidence consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with the well-known principles of human action? "As one principal

Is the evidence consistent with the common experience of mankind?

ground of faith in human testimony is experience, it necessarily follows," says Mr. Starkie, "that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a witness, who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance[1] stated by Mr. Lock, that is asserted, which is not only unsupported by common experience, but contrary to it, belief is slow and difficult."[2] The test of which I now speak will be most safely applied by the Judge, who has himself had the greatest experience; but, as the widest individual knowledge and observation cannot possibly extend over the whole field of human experience, and as time develops many novelties, the possibility of the existence of which once appeared incredible,[3] it will be necessary to avoid the Scylla of indiscriminate scepticism on the one hand, while endeavouring to steer clear of the Charybdis of unbounded credulity on the other. The story of the Dutch Ambassador and the king of Siam will be well borne in mind by Englishmen, who have been appointed to judicial office in India. They will find much that is either new to them or contrary to their own preconceived ideas; and will at first have need to be cautious and careful to a degree, while, even long after they have passed their novitiate, they will do well to remember the remarks of the Roman poet—"No man was ever endow-

[1] The Dutch Ambassador told the king of Siam that the rivers of Holland were occasionally frozen so hard that an elephant might walk over on the ice. "Hitherto," said the king, who had had no experience of such a phenomenon, "I have believed the strange things you have told me, but now I am sure you lie"—Book IV, Chapter XV.

[2] Page 832.

[3] As steam communication by land and sea, and the wonders of the telegraph would have appeared to our ancestors. It is related that the value of the evidence given by George Stephenson before a Parliamentary Committee was greatly lessened by the fact of his having stated that *steam-carriages might possibly travel on rail-roads twelve miles an hour.* It would have been wholly destroyed had he said *sixty miles an hour:* and yet the latter now happens every day.

ed with a judgment so correct and judicious, but that circumstances, time, and experience would teach him something new, and apprise him that of those things, with which he thought himself the best acquainted, he new nothing; and that those ideas, which in theory appeared the most advantageous, were found, when brought into practice, to be altogether inapplicable."[1]

Omissions.

§ 34. It will often be necessary to consider the effect of *omissions* in the testimony of witnesses; and, in determining how far an indication of truth or falsehood is thus obtainable, it will be important to see whether the omission to mention a particular fact arises from wilful suppression, or from the witness's attention being riveted upon some other facts, with describing which his mind has been wholly engrossed.[2] If the fact be one which could not possibly have escaped his observation, supposing him to be a true witness, and if, on being indirectly questioned, he evince no knowledge of it, or, being directly questioned, deny such knowledge, the supposition of inadvertence is scarcely possible, and a discrepancy is apparent. The negative circumstance[3] also of a witness's *omitting* to mention such things, as it is morally certain he *would* have mentioned, had he been inventing, adds great weight to what he does say. Besides the consideration of omissions in the testimony of individual witnesses, it is necessary also to estimate the effect of omissions in the evidence taken as a whole. If a single witness attest several circumstances, each of which is capable of corroborating evidence; and if no such corroborating evidence is produced, there must be great confidence in the integrity and veracity of this single witness to believe all these circumstances on his sole testimony, where, if they were true, there would be concurrent evidence to strengthen and confirm his statements.[4] The instance of a single link in a chain of

[1] Terence.

[2] See *Wills on Circumstantial Evidence*, p. 292.

[3] *Whately's Rhetoric*, Part I. Chap. II. § 4.

[4] See *Gilbert on Evidence*, p. 180.

proof being wholly wanting requires no particular comment. Where a case is supported by several parallel chains, the want of a link in any one of them renders that particular one wholly useless, and throws the whole strain on the others: but where the entire weight depends from a single chain only, the failure of one link, however strong the remaining links may be, must be fatal; and even where the link is not wholly wanting, but merely partly defective, it is well to remember that a chain is not stronger than its weakest part. There is, however, one omission, which it is important to notice, inasmuch as a wrong construction is daily put upon it in the lower Courts in India. I speak of the non-production of *all* the evidence which it is possible to offer of any particular fact. From this no adverse conclusion can properly be drawn, if the evidence actually given be sufficient and be unimpeached. In in the case of *Ramalinga Pillai* v. *Sudasiva Pillai*,[1] their Lordships of the Privy Council said:—"Several witnesses, whose testimony is not directly impeached, deposed to these facts; but it was urged in argument that many other persons were present on the occasion, who ought to have been produced on the part of the respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced."

§ 35. Analogous to the subject of omissions is the consideration of statements, arguments, and evidence directly put forward and remaining *uncontradicted* by the other side. This is a sort of negative testimony given by *adversaries*, which is often of considerable weight. The direct testimony of adversaries is, of course, of still greater weight. In India such evidence going immediately to the point at issue is not often met with; but, as falling under the head of "undesigned," it occasionally presents itself and may be at times educed by a little skilful examination. In the testimony not of adversaries only, but also of unwilling witnesses, it will generally be found that this consists more in something

Testimony of Adversaries.

[1] 9 *Moo. Ind. Ap.* 506. 4th February, 1864.

incidentally implied than in a distinct statement. It will, however, sometimes happen that even an adversary will admit something that makes against him in order to contest some other point, to his thinking more important.[1] One way in which a hostile witness may, and often does serve the case which he came to damage, is when he appears not to believe[2] himself, or not to understand the thing he is reporting, when it is such as is to his hearers not unintelligible nor incredible by reason of their superior knowledge either generally or in the particular case.

Witness proving too much.

§ 36. It occasionally happens that the unreliability of a witness's testimony is shown by his *proving too much*. In his eagerness to assist the side on which he is called, he states some fact which to him in his ignorance appears calculated to promote this result, but which, taken with other facts proved or admitted, has a tendency directly the opposite, and lets in the light on the scenes behind, which have been carefully kept from view; or he makes a statement from which is deducible not only the conclusion sought to be established, but another which is absurd or inadmissible.[3] In the case of *Suriah Row* v. *Cataghery Buchiah*[4] Lord Brougham thus remarked on this subject:—"The observation one cannot help making upon this evidence, is that it proves too much on behalf of the defendant, who gives that suspicious evidence; in answer to which it is ingeniously suggested, as it is often under the pressure of the cause, that it can-

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[1] See *Whately's Rhetoric*, Part I. Chap. II. § 4.

[2] *Idem.*

[3] "It is evident that either the *premiss* of an opponent, or his *conclusion* may be disproved, either in the direct or in the indirect method; *i. e.* by proving the truth of the *contradictory*, or by showing that an absurd conclusion may fairly be deduced from the proposition you are combating. When this latter mode of refutation is adopted with respect to the *premiss*, the phrase by which this procedure is usually designated, is that the "argument proves too much, *i. e.* that it proves, besides the conclusion drawn, another which is manifestly inadmissible."—*Whately's Rhetoric*, Part. I, Chapter III, §. 7.

[4] 2 Moo. Ind. Ap. 113—17th December 1838.

not be supposed, that the witness was suborned, for that if he was possessed of common shrewdness, he would not have over-done the thing, and thus have given rise to such an objection. This is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance upon it; for we do find, happily for the ends of justice, that men *do* fall into these inconsistences, and by means thereof the fraudulent character of the evidence becomes apparent. In the opinion of their Lordships, no reliance can be placed upon that remark to rebut the observation to which it is applied."

Danger of attempting to prove too much in a case.

§ 37. In connection with the same point I may remark upon the danger of attempting to prove too much, of ever advancing more than can be well sustained; since the refutation of *that* will often quash the whole. A guilty person may often escape by having too much laid to his charge; so he may also by having too much evidence against him, *i. e.* some that is not in itself satisfactory: thus a prisoner may sometimes obtain an acquittal by showing that one of the witnesses against him is an infamous person or actuated by some malignant motive, though, perhaps, if that part of the evidence had been omitted, the rest would have been sufficient for conviction. An argument, or a piece of evidence, which has been refuted, ought, strictly speaking, to go for nothing. The conclusion sought to be established thereby may be quite true, and may be capable of being established by other arguments or other evidence. Yet men—and judicial functionaries in common with other men—are apt to take for granted that the conclusion itself is disproved when the arguments or evidence brought forward to establish it have failed or have been satisfactorily refuted. The mistake arises from assuming that these are *all* the arguments that could be urged.[1] If they are *all* the arguments or evi-

[1] See *Whately's Logic*, B. III, § 18; and *Rhetoric*, Part 1, Chapter III, § 7. There is an error somewhat similar in kind, which is very common amongst judicial officers in the Mufassil. The allegation of the plaintiff and

dence advanced in that particular case, of course the Judge is right, inasmuch as he is bound to decide *secundum allegata et probata;* but if there are other arguments and other evidence in the case, he must not let his attention be wholly diverted from *these* by the address of an advocate, who directs his attack against those portions only of the adversary's case, which cannot be maintained. A wise general will abandon those outworks which he knows to be incapable of defence, or the attempt to defend which may endanger the safety of his main position; but in the contests of the *forum*, more especially of the Indian *forum*, this caution and care are frequently wanting, a fresh duty being in consequence imposed on the Judge, as the *arbiter* of the result.

Affirmative and negative evidence.

§ 38. When one witness deposes to a certain fact having occurred, and another witness, stating that he was present at the same time, denies that any such fact took place, greater weight, other things being equal, is to be attached to the witness alleging the affirmative. In the case of *Chaudhri Debi Persad and Bani Persad* v. *Chaudhri Daulat Singh*[1] their Lordships of the Privy Council made the following observation:—"In estimating the value of evidence, the testimony of a person, who swears positively that a certain conversation took place, is of more value than that of

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the allegation of the defendant are taken and coupled together by a disjunctive to form an issue which stands thus—"whether the story of the plaintiff or the story of the defendant is true:" and the judicial officer proceeds to decide which story is false or unproved, taking it for granted that, if one story be false or unproved, the other must be true. But in a very large proportion of cases this by no means follows. The proper issue is single, not double—is the allegation of the party, upon whom the burden of proof lies, true? The allegation of the other side may be true, and still it may not follow as a necessary conclusion that the first allegation is false—or it may be false and still there may be no necessary inference that the first allegation is true, for it may be false for one of many other reasons besides that which has been put forward and has failed. For an illustration of the danger of this double issue see *Amír Beparí and another* v. *Hari Mohan Karmokar and another*, 23 W. R. 87.

[1] 3 Moo. Ind. Ap. 357.

one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time." When a witness deposes to his own turpitude, little or no faith is to be placed in his testimony. In *Kali Chandra Chaudhri* v. *Sib Chandra Bhaduri and others*, (6 B. L. R. 507) their Lordships said they were of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them.

Witness deposing to his own turpitude.

§ 39. As a general rule, a Judge should *weigh* not *number* witnesses. The tendency of modern improvements in the rules of evidence has been to admit every kind of evidence, leaving it to the Court to form its own opinion of the weight to be assigned to the evidence when admitted. The old Evidence Act (s. 28, Act II of 1855) enacted that, except in cases of treason, the direct evidence of one witness, who is entitled to full credit, should be sufficient for proof of any fact: and the present Act (s. 134, *post*) enacts that no particular number of witnesses shall, in any case, be required for the proof of any fact. The number of witnesses, therefore, is a less important consideration than the weight to be attached to the individual testimony of each or to the sum of the testimonies of all taken together. But the number of witnesses may nevertheless under certain circumstances be of very great importance. "Where direct testimony," says Mr. Starkie, "is opposed by conflicting evidence, or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury than that one or a few should be mistaken or wilfully perjured. In the next place not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the

Witnesses to be Weighed not Numbered.

number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied." The first portion of these remarks applies with far less force in India than in England; but the latter portion is equally applicable in both countries. In false cases in India there is generally no lack of witnesses; and any deficiency in the *weight* of the witnesses individually is sought to be made up by *number*. In fact, one mark of a false case is not uncommonly the extraordinary number of persons who are said to have seen some occurrence, which in the natural course of things would have been witnessed by a limited number of persons only. At the same time cases sometimes arise which illustrate the truth of the remark that two or three persons are far more easily found than a larger number, who, from motives of interest or malignity, will combine to aggrandize themselves or to ruin an opponent. Their story, too, being for the most part simple, is readily concocted and remembered, while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. It is on this account that the uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c. or are known, like accomplices, to be persons of bad character, and to have an interest in the result, have ever been regarded with merited distrust, and are now, in practice, generally deemed insufficient to warrant a conviction.[1] It sometimes happens that several witnesses are called, and appear to be bearing concurrent testimony to the same thing, when they are really attesting different things, one witness being called to prove one of the facts, and another witness to prove another of the facts, which go to make up the entire case; but two witnesses being never called to prove the same fact, lest they should contradict each other on cross-examination.

[1] Tay. Ev. Vol. I, p. 80, § 58.

§ 40. I now pass to some remarks concerned more especially with Indian *witnesses*, and the value to be attached to their testimony. There would appear to be an opinion pretty generally prevalent,[1] that witnesses in India are more mendacious than witnesses in other countries; and it has been repeatedly stated that Judges in India have a far more difficult task to perform than Judges in England in consequence of the untruthful nature of the evidence with which they have to deal. Some persons have even gone so far as to say that while the presumption in England is that witnesses tell the truth, the presumption in India ought to be that they lie. In the case of *Rungama* v. *Atchama* [2] their Lordships of the Privy Council observed as follows:—"These instruments are produced, and the facts tending to this conclusion are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony beyond the observation which may be made on all Hindoo testimony, that perjury and forgery are so extensively prevalent in India, that little reliance can be placed on it." It would be possible to quote from other judgments, as well of the Privy Council as of the highest Courts in India, passages in which the great prevalence of perjury and forgery is admitted and lamented; but it is not within either the Author's wish or the scope of his present subject to exaggerate the reproach of this particular immorality by multiplying proofs of its existence. At the same time, to make no allusion whatever to

Value of testimony of Indian witnesses.

[1] "Thus it has been justly observed, that a propensity to lying has been 'always more or less a peculiar feature in the character of an enslaved 'people—accustomed to oppression of every kind, and to be called upon to 'render strict account for every trifle done, not according to the rules of 'justice, but as the caprice of their masters may suggest. It is little to be 'wondered at if a lie is often resorted to as a supposed refuge from punish-'ment, and that thus an habitual disregard is engendered.'—This passage is cited as accounting in some measure for the lamentable neglect of truth which is evinced by most of the nations of India, by the subjects of the Czar, and by many of the peasantry of Ireland." Taylor, Vol. I. § 45.

[2] 4 Moo. Ind. Ap., p. 1—24th February 1848.

the evil would be inconsistent with the design of the present remarks, which are intended more especially to guide those who require guidance. It will then be sufficient to say that, while on the one hand it would be a gross slander to predicate of all the natives of India, as of the Cretans, that they are liars,[1] it would, on the other hand, be misleading the young judicial functionary to tell him that he may safely look for as much truth in an Indian as in an English witness-box.

§ 41. During the last half century education has been gradually bringing forth fruit; and one of its best fruits has been an increasing regard for truth among those classes

[1] The subject was debated a few years ago both in the Chamber of the Legislative Council and in the Public Press in connection with the "Oath's Act." The *then* Lieutenant-Governor of Bengal, Mr. (now Sir) George Campbell, is reported to have thus expressed himself in Council :—"Dealing as they were with a peculiar people, with whom the speaking of truth was not in any way the custom, he felt that the means which were available for getting at the truth were defective. He would go back and say one or two words in respect to the expressions which had fallen from his hon'ble friend Mr.——, becausee he wished to put himself right with the Council and with the natives of the country in a very important matter. Mr.——said that His Honor's belief was that the natives were above all men liars. His Honor wished most distinctly and completely to deny that that was his opinion. Although he had taken a logical view of the matter in saying that truth was not estimated by the majority of the natives as a virtue, he was not one of those who held exaggerated ideas in regard to the untruthfulness of the natives. He believed he was one of those who held the best opinion of the natives. He believed that they had many virtues, and that many of them spoke the truth in an honourable way; but he did not think that truth was considered by them as an honourable virtue to the same extent that it was so considered by Englishmen. He had not heard, in the various discussions that had taken place on the subject, that any one had contradicted him on that point. His argument rather was, not that the natives were above all men liars, but rather that lying was natural to mankind, and that truth was a peculiar virtue which was only developed in certain civilized countries. He thought that the natives were on the same platform and parallel with most of the world in regard to the speaking of truth. He thought he was not doing any injustice to the people amongst whom he had spent his life in saying that truth, as truth, was not regarded as a virtue amongst them to the extent that it was regarded amongst some of the people of Western Europe."—*Proceedings of the Legislative Council, 13th April* 1872.

Some causes of the want of truth in India.

who have had the benefits of education.[1] But no fruit has been produced where no seed has been sown, and the great mass of the population, including more especially the lower classes, do not make a habit of speaking the truth, or regard falsehood with feelings of shame or abhorrence. Respectable natives do not, as readily and willingly as Englishmen, attend a Court of Justice to give evidence. Even in their own cases, where they have personal knowledge of the facts, they prefer calling or sending their servants or dependents to depose to them; and such persons are often more zealous for the success of a cause, the conduct of which is to a certain extent in their hands, than for truth. Again, the feeling of revenge, which is so strong in the breast of the Oriental,[2] is perpetually suggesting new ways of achieving that vengeance which is almost as dear as life;[3] and, in these days of law and order, a false case, by which a man may be deprived of his paternal lands

[1] One of the best fruits of education (using the term in its widest sense) is to make truth respected and falsehood contemned. Wherever ignorance has prevailed, in the West or in the East, falsehood and perjury have flourished. Mr. Hallam, after noticing the prevailing ignorance of the Middle Ages, proceeds to describe the degradation of morals. His description contains the following passage—"One crime, as more universal and characteristic than others, may be particularly noticed. All writers agree in the prevalence of judicial perjury"—Middle Ages, Chap. IX, Part 1. Sir James Stephen says:—"According to my observation, the power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts, and power of description, properly proportioned to each other, is much less common than people usually suppose it to be. It is extremely difficult for an untrained person not to mix up inference and assertion. It is also difficult for such persons to distinguish between what they themselves saw and heard and what they were told by others, unless their attention is specially directed to the distinction"—*Introduction to Indian Evidence Act*, p.44 *note*. The Author's experience of Indian witnesses entirely corroborates the truth of these remarks.

[2] To understand thoroughly the words "avenge me on mine enemy," one must have dwelt in the East.

[3] The Annals of Crime in India contain many instances of persons having *killed themselves* under circumstances from which it was clear that they intended it to appear that they were *murdered* by those with whom they were at enmity, in order that the latter might be punished for their murder.

or sold out of house and home or even consigned to the walls of the criminal jail, is a common device with the native for obtaining his desire upon his enemy. Then, in India, every man has his own caste, separate profession and occupation; and as *thugs* take to *murder*, and *dakaits* to robbery, and *dancing girls* follow prostitution, so other members of the least moral portion of the community devote themselves to perjury and forgery, and are willing to hire their services to those who may require them. Just as an unscrupulous Italian will employ a professional assassin to remove his adversary from his path, so an unscrupulous native of India will employ a professional perjurer or forger to work out *his* particular scheme of vengeance; and the man who will not hesitate to pay the wages of this iniquity will occasionally himself scruple to forswear himself. It would, however, be a great mistake to suppose that *all* natives of India are addicted to these vices in which *some* natives indulge and for which *some* districts are notorious. The upper and more educated classes are as free from them as the same classes in other countries of equal civilization; and they regret their existence among their less enlightened countrymen.

§ 42. From what has just been said, it will be evident that judicial functionaries in India should be most careful in the oral examination of witnesses. If, however, care be exercised and ordinary attention be devoted to this duty, the Author is persuaded that the task of discovering the truth is not a very difficult one in the great majority of cases, or impossible in any. Few men are really good actors: and there is a remarkable difference between the demeanour of a witness who is describing a scene or occurrence which he actually saw, and that of a witness who repeats from memory a story which has been taught him. The former, while detailing what his eyes have seen, throws an unmistakable vitality into his narrative—his eyes are lit with intelligence, his features are all in motion, his hands make unconscious indications, no part of his body is wholly at rest,—and all these

Demeanour of Witnesses.

combined together produce a series of pantomimic gestures, illustrative and corroborative of the details of his narrative.[1] The latter, on the other hand, either stands perfectly motionless or is fidgety and restless; his features are impassive; the pupil of the eye is fixed; he gazes at empty space, instead of watching the face of the Judge or of the examining advocate, to see if he is understood; he hurries on with his story lest he should lose the thread of it, and is impatient of interruption; occasionally as he forgets his cue, the dry white tongue is thrust hurriedly out and as hurriedly withdrawn, or the apple in the throat rises and as suddenly falls; and his whole attitude and demeanour cannot fail to remind his hearers of a school-boy, repeating, in the presence of a stern pedagogue and with the fear of the rod before his eyes, a task which he has learned by rote.

Other indications of Truth or Falsehood.

§ 43. The following passage from Mr. Taylor's work exhibits another picture, many of the lines of which are also true in India:—"While simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct. So when we find a witness over-zealous on behalf of his party; exaggerating circumstances; answering without waiting to hear the question; forgetting facts wherein he would be open to contradiction; minutely remembering others which he knows cannot be disputed; reluctant in giving adverse testimony; replying evasively or flippantly; pretending not to hear[2] the question for the purpose of gaining time to consider the effect of his answer; affecting

[1] The above description will apply more or less exactly according to the *race* to which the witness belongs. The majority of witnesses in India (Bengal at least) are—like, but not so much as, Irish peasants—demonstrative when describing what they have seen.

[2] In India a witness will with the same object pretend not to understand the Judicial officer when speaking in the language of the country, though he has understood and answered every question previous to the crucial one. Whether he has so understood and answered is always important.

indifference; or often vowing to God[1] and protesting his honesty,—we have indications more or less conclusive of insincerity and falsehood. On the other hand, in the testimony of witnesses of truth there is a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection."[2] To the same effect, though in somewhat different language, Starkie writes:—"An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question for the purpose of gaining time to consider the effect of his answer; precipitancy in answering without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction; or his forwardness in minutely detailing those where he knows contradiction to be impossible; and affectation of indifference,—are all, to a greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction, if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity."[3]

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[1] In India not infrequently a witness spontaneously prefaces his evidence by a declaration that he will tell the truth only, and on no account say anything that is false. I have occasionally found this to be the prelude to more than usual mendacity.

[2] Vol. I. p. 68, § 45.

[3] Page 822.

§ 44. I have already mentioned the fact that true as well as false witnesses are not infrequently *prepared* in India. Both may, therefore, display the same volubility in the witness-box; but the difference between the true and the false witness becomes very apparent when each is stopped in repeating the story committed to memory and is compelled to answer questions. The true witness may be a little put out at first; but he has a fund of real ideas to fall back upon, and he quickly recovers himself and gives natural and intelligent answers. The false witness, on the other hand, knows only the story he has been taught, and his perplexity and embarrassment are too obvious to escape notice, as he racks his memory, perhaps in vain, to try and find in what he has learned by rote suitable replies to the questions that are put to him. Another way of treating a witness suspected of being mendacious is to forbear to express the impression he has inspired. Supposing his tale clear of suspicion, the witness runs on his course with fluency till he is entangled in some irretrievable contradiction at variance with other parts of his own story, or with facts notorious in themselves or established by proof from other sources.[1] Away from large towns and other haunts of professional witnesses, many of the witnesses who come before the Courts in India are ignorant peasants; and, however carefully they may be prepared, their limited capacity makes it almost impossible for them, if properly examined, to carry a false story successfully through all its stages, more especially if it take them at all out of the experiences of their own every-day life and into matters which are to them strange and unfamiliar.[2] Before leaving the subject of the demeanour of witnesses, I may remark that the Codes of Civil and Criminal Procedure require the Courts to record such remarks as they may think material respect-

Interrogative test of Indian witnesses.

[1] *License* of *Counsel*, p. 5.

[2] And see remarks at p. 35, *ante*.

ing the demeanour of witnesses while under examination. The object of these provisions is to make up in some respect for the deficiency which Courts of Appeal must labour under in having merely the dead record before them, and not seeing the living witnesses.

Directing witnesses to withdraw.

§ 45. When it appears essential for the elucidation of the truth, the witnesses should be examined out of the hearing of each other. An order for all the witnesses on both sides to withdraw, except the one under examination, should generally be made upon the motion of either party at any period of the trial. If a witness remain in Court in contravention of this order, it is under English law a contempt and may be punished accordingly. A Judge cannot reject the testimony of a witness, who has thus remained in Court, though his disobedience ought to be recorded and may materially lessen the value of his testimony. In India a *witness-room*, where the other witnesses can be kept out of hearing of the witness under examination, ought to be attached to every Court.

Confronting of witnesses.

§ 46. When the testimony of witnesses called on opposite sides is directly conflicting, it is occasionally a good plan to confront them. "This practice," says Mr. Taylor, "which still prevails largely in the County Courts, and is there often productive of highly useful results, has, for some unexplained reason, grown into comparative disuse at Nisi Prius. This is to be regretted; for the practice certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth." In India, where the evidence is so often directly conflicting, this is a most valuable means of discovering the truth, and the Author has often adopted it with success.

Ability of witnesses.

§ 47. In connection with demeanour, it is very important to consider the ability of the witness, as well his intellectual capacity as his powers of perception, judgment, memory, and description.[1] Where cognizance of the fact related has been obtained through the sense of sight, the light in which the object was placed is important. Different degrees of weight would properly be attached to identification made in broad daylight, by moonlight, by the light of the stars, and during the darkness of the night; and the fact of the person identified being previously known or otherwise to the identifier, is also important. In the case of hearing, the sounds which reached the ear may have been faint; or, of the sounds produced by the sonorous body, parts only, and those broken and interrupted, may have reached the ear. In the case of words spoken, the voice of the speaker may have been faint, the distance at which he stood considerable; and some of his words may have excited, while others failed to excite, a distinct perception. If the fact and its circumstances were of such a nature as to be likely to attract the witness's attention, his perception is likely to be the more clear and distinct; while the contrary will be the case, if the transaction was remote or unlikely to excite notice and observation. 'Had the witness any motive or object,' is also important in connection with the degree of attention given to the transaction. Again, perception may have been rendered faint or indistinct by old age. Attention may have been rendered indifferent; judgment hasty, negligent, and erroneous, by want of knowledge, general or particular, absolute or relative,—the fruit of relative experience, observation, information, and meditation. In connection with the same subject Archbishop Whately writes thus—"When the question is as to a fact, it is plain we have to look chiefly to the honesty of a witness, his accuracy and his means of gaining information. When the question is about a matter of opinion, it is equally plain that his ability to form a judg-

[1] See the following subject discussed more at large by Bentham, p. 162 and following pages: and by Starkie, p. 824. I have borrowed from both.

ment is no less to be taken into account * * *" and again—"Even when the question relates to what is strictly a matter of fact, the intellectual character of the witness is not to be wholly left out of the account. A man strongly influenced by prejudice, to which the weakest men are ever the most liable, may even fancy he sees what he does not. And some degree of suspicion may thence attach to the testimony of prejudiced, though honest men *when their prejudices are on the same side with their testimony*, for otherwise their testimony may even be the stronger * * * * It is most important, therefore, to remember what is often forgotten—that credulity and incredulity are the *same* habit considered in *reference to different things*. The more easy of belief any one is in respect of what falls in with his wishes or preconceived notions, the harder of belief he will be of anything that opposes them."[1]

Memory considered.

§ 48. "Another intellectual cause of incorrectness in human testimony," says Bentham,[2] "is failure of memory. A failure of this sort may have had for its cause either some original faintness or indistinctness in the act or acts of perception, or else the lapse of time, the length of the interval between the point of time at which the fact presented itself to the perception of the witness, and the point of time at which it happens to him to exhibit his statement of it for the information of the Judge. From the weakness of the memory may result two different and in some respects opposite effects—non-recollection and false recollection." As to the latter he remarks further on, "Without any the least false consciousness as to any point whatever, without any intention or desire of departing in any point from the strict line of truth, a supposed recollection may be false, not only in quantity, quality, or other circumstance, but even *in toto*. I can speak from experience: recollection false even *in toto* is what it has every now and then, happened to me to detect myself in. I

[1] *Whately's Rhetoric*, Part I, Chap. II, § 4.

[2] Page 165.

should expect to find this to be the case more or less with every body. I speak of recollection devoid of all importance, and the expression of which has never gone forth, nor been intended to go forth, out of my own breast; and in respect of which all inducements to mendacity, all causes of bias, have consequently been out of the question. One circumstance, however, has been common to all these instances of misrecollection and false recollection: the image of the supposed transaction has been faint and dubious. It has been deduced, as it were, in the way of inference, from some real and better recollected facts, which have operated as evidentiary facts with relation to these false ones. It might be regarded as the work of the imagination, were it not for its having a distinct and solid ground to rest upon in the truth of things. * * * * On the other hand, when the recollection, the internal evidence, is clear and strong to a certain degree, there is no room left for any such external evidence to operate. * * * * A recollection which is false in circumstance only, may be so either by being superadded to such parts of the recollection as are true, or substituted to one or more of them. * * * * A recollection false *in toto* is as easy to describe and conceive as a recollection false in circumstance. It, however, scarcely admits of being realized."

§ 49. The ability of a witness may be defective neither in perception, judgment, nor memory; but he may be unable to describe accurately what he has seen, and the image of which is clear to his own mind. "The picture of the fact," says Bentham, "as painted in the memory of the witness at the time of deposition, may be ever so correct; yet if the copy exhibited by the words and other signs employed by him for the expression of it be otherwise than correct, such accordingly will be his evidence. By an infelicity in the expression, the fruit of the most correct perception and the most retentive memory may be rendered abortive." And if the copy may be incorrect when the witness speaks the same language as the Judge,

Descriptive Powers of witness.

how much greater room for incorrectness is there when the vernacular of the witness and of the Judge are different, and, by a process of mental translation, there is presented to the Judge's mind *a copy of the copy* produced by the witness! The danger of inaccuracy in this respect, when European Judges sit to administer justice in a language foreign to them, cannot be over-exaggerated or too carefully guarded against. Bentham further remarks that *timidity* is, in the case of *viva voce* examination, perhaps the most frequent cause of incorrectness in the expression. This timidity may arise from inferiority in respect of rank, sex, or age, or from the natural constitution of the individual. In connection with the present topic may also be considered Archbishop Whately's remark that persons unaccustomed to writing or discussion, but possessing natural sagacity and experience in particular departments, have been observed to be generally unable to give a satisfactory reason for their judgments, even on points on which they are actually very good judges.[1] And it may be added that the same persons are often incapable of describing clearly what they thoroughly understand.

Admixture of falsehood with truth, common in India.

§ 50. One of the commonest cases in India, and by far the most difficult to deal with, is where falsehood is admingled with truth. This happens in various ways and with different objects. Sometimes the story concocted is to all intents and purposes false, having reference to the purpose for which it is used, although it may have been reared upon a true basis. "If an individual," said Lord (then Mr.) Brougham, on the occasion of a celebrated trial, "were to invent a story entirely—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, he may raise a tale, which, with a good deal of drilling, may put an honest man's life in jeopardy. * * * * * The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much or to

[1] *Rhetoric*, Part I, Chap. III. § 1.

come too directly to the point; but to lay the foundation in existing facts and real circumstances—to knit the false with the true—to interlace reality with fiction—to build the fanciful fabric upon that which exists in nature—and to escape detection by taking most especial care never to have two witnesses to the same fact, and also to make the facts as moderate and as little offensive as possible." A common instance is an *alibi*, when sought to be proved for a prisoner's defence. Everything may be perfectly true except the *date*. The whole transaction described may have really occurred, and the prisoner may have been a chief actor or one of the actors in the scene, only on a day different from that stated by the witnesses. Again, it happens very commonly in India that a perfectly true case is sought to be proved by false witnesses and forged documents. The actual witnesses of the transaction may be dead, or may be persons who, from their position and from native ideas on these subjects, may be unwilling to come into Court and depose to what they know; or the persons who have charge of the preparation and management of the case, may be, as too often they are, wholly ignorant of the proper mode of proving the facts, which must be proved in order to succeed. Aiming only at success, they may be wholly unscrupulous as to the methods to be employed in attaining it; or, conscious of the goodness of the cause which they have in hand, and justifying the means by the end, they may think it small harm to use crooked paths in order to secure ultimate justice. It may be also that the uncertainty and doubt which formerly hung over the rules of evidence binding on the Mofussil Courts, were in some respect responsible for the evils born of the darkness which they contributed to create.

§ 51. The duty of a Judge in a case of this kind is well pointed out by the Calcutta High Court in the following passage:—"The Court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of

The whole evidence not to be rejected because part is false.

deciding according to the truth of the matters in issue. The person using such evidence may have brought himself within the penalties of the Criminal Law; but the Court should not in a Civil suit inflict a punishment under the name of a presumption. Forgery or fraud in some material part of the evidence, if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may, perhaps, also have the further effect of gaining a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause. In a recent appeal heard by the Privy Council (*Raní Swarnamayí* v. *Máhárájáh Satis Chándrá Rai Báhádúr*, 23*rd July*, 1864), their Lordships sustained the appeal, although they treated the whole of the parol evidence of the appellant as unworthy of credit, and a confirmatory pattah produced by her as a forged instrument. In the judgment it is said, 'that 'when false witnesses or forged documents are produced in 'support of a case, the fact naturally creates suspicion as to 'the case itself; and if the evidence, upon which their Lord-'ships act, depended in any degree for its credibility or weight 'on such witnesses or documents, they would have paused 'as to their conclusion. The fact is not so, however, in the 'present case: their Lordships believe they have to deal with 'a just case foolishly and wickedly attempted to be supported 'by false evidence. This misconduct must not mislead them 'in the advice they will have to tender to Her Majesty, 'which will be that the appeal be sustained, and the decrees 'complained of reversed.'"[1]

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[1] *Garibúla Ghazi and others* v. *Gúrú Das Rai*, 2 W. R. Act X Rulings, p. 100; see also *The Bengal Indigo Company* v. *Tariní Persad Ghose*, 3 W. R. Act X Rulings, p. 149; and *Kuttú Mahomed* v. *Hardeb Das*, 19 W. R. 107.

§ 52. In the case of *J. P. Wise and others* v. *Sandalúnissa and others*[1] their Lordships of the Privy Council said:—"In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it by fabrication of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. * * * * * A native, even with an honest case, or his advisers, may fabricate evidence to meet a case, which they fear, though they know it to be groundless."[2] In another case the same high authority remarked as follows:—"That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or law."—(*Pattabhiramier* v. *Vencatarow Naicken*, 7 B. L. R. 143.) And again—"It might be possibly an advantageous rule if, as Mr. Scott expresses in his judgment, that where a party 'has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not at liberty to assume for him a position which he has himself rejected.' But their Lordships are unable to arrive at that conclusion, and are apprehensive that, if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party.....We find also in a recent case, *Raní Súrnamayi* v. *Mahárájá Satish Chandra Rai*, this Com-

A case may be true, though sought to be supported by perjury or forgery.

[1] 11 Moo. Ind. Ap. 177—25th February, 1867.

[2] The Author has heard of a case in which a native forged a bond for a considerable amount, and with the help of false witnesses sued his adversary thereon; who, despairing of showing the falsity of the plaintiff's case, admitted the bond, forged an acquittance and produced an equal number of witnesses to prove this document!

mittee gave effect to the defendant's title, although a document by which she sought to strengthen it was found to be a forgery. The evidence which is not susceptible of being forged is *primâ facie* strongly in favour of the defendant. However much the want of trustworthiness in the evidence of cases from India is to be regretted, we cannot, by reason of the proof that a document adduced by one party is forged, transfer the property in which he and those through whom he claims have been in possession at the date of the suit for forty-four years to another who has not, in the opinion of their Lordships, established any right to it himself."—*Sevvaji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti*, 10 Moo. Ind. Ap. 161—163.

§ 53. In connection with the same subject, but more especially with reference to the testimony of individual witnesses, Mr. Norton well observes thus:—"There is a maxim —*falsus in uno, falsus in omnibus*,—false in one particular, false in all. I need hardly say that this is everywhere a somewhat dangerous maxim, but especially in India; for if a whole body of testimony were to be rejected, because the witness was evidently speaking untruth in *one* or more particulars, it is to be feared that witnesses might be dispensed with; for, in the great majority of cases, the evidence of a native witness will be found tainted with falsehood. There is almost always a fringe or embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence; and it *may be* so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point." The case will, however, be different if one of the essential circumstances in the story be clearly unfounded. This, to use a felicitous expression of Mr. Hallam's, is *to pull a stone out of an arch*: the whole fabric must fall to the ground.[1]

Danger of the maxim "falsus in uno, falsus in omnibus."

[1] "The tendency of any mixture of error in testimony is to lessen the probability of the whole. This diminution is in many cases so small as not

§ 54. Some Judicial officers in India are apt to commit the mistake of disbelieving almost all evidence that is brought before them. Convinced of the general unreliability of native evidence, they suspect every witness and doubt every document produced in every case; and not unfrequently their administration of justice resolves itself into a sceptical scrutiny of the evidence presented to them, in which if they find some traces of falsehood, they immediately reject the whole. This happens not infrequently at the second stage of a judicial career (the first stage being generally that of too implicit belief), before riper knowledge of the country and its usages, and maturer experience of native habits, manners, tendencies and proclivities have taught the happy medium that lies between the two extremes. The following observations of the Lords of the Privy Council are directed against this erroneous mode of exercising the judicial office:—"It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion, and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail. But we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, nor unless the impeaching or discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing *vivâ voce*, how necessary soever it may be always to sift such evidence with great minuteness and care."[1] And in another case:—"Had their Lordships found that his (*i. e.* the Judge's who tried the case in

Danger of doubting all native evidence.

perceptibly to affect our belief. But where an essential circumstance in a story is evidently unfounded, it is to *pull a stone out of an arch*: the whole fabric must fall to the ground."—*Constitutional History of England*, Vol. II. p. 637.

[1] *Madhú Súdhun Sandyal* v. *Sarúp Chandra Sircar Chaudhrí*, 4 Moo. Ind. Ap. 431.

the first instance) observations upon the witnesses themselves were opposed to the opinion of the Sádr Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided in a conflict of testimony nearly balanced by the preponderance of probabilities. But if there be found, even in a native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of native testimony—to say despite of this positive testimony—we will put all evidence aside and act alone on the probabilities of the stories and the inferences from the conduct of the parties."[1]

Uncontradicted evidence not to be discarded.

§ 55. The following remarks are also pertinent—"This evidence is wholly uncontradicted, and yet, surely, if capable of contradiction, some evidence might have been adduced to impeach its credibility—some evidence either to show that the facts did not take place as stated, or to throw a doubt upon the testimony as to the handwriting. We have no such evidence; we must, therefore, necessarily come to the conclution that the genuineness of the document is established. It would, indeed, be most dangerous to say that, where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of native evidence. Such an argument would go to an extent which can never be maintained in this or any other Court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it."[2] And again :—"Their Lordships are led by the judgment under review, and by some portion of the argument which

[1] *J. P. Wise and others* v. *Sandalúnissa Chaudhraní and others*, 11 Moo. Ind. Ap. 177.

[2] *Banwari Lal* v. *Hetnarain Singh*, 7 Moo. Ind. Ap. 148.

has been addressed to them, to state, as has often been stated before by this Committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight must be given to evidence there as elsewhere; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others *to the suspicions and not to the deliberate judgment* of their appointed Judges. Nor must an entire history be thrown aside, because the evidence or some of the evidence of some of the witnesses is incredible or untrustworthy."[1]

Peculiar tests of written instruments.

§ 56. With respect to written instruments and the possibility of testing the genuineness of the evidence derivable therefrom, the following observations are most valuable:—

"Amongst other arguments urged for the respondents, it was said that, with regard to instruments of this kind, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence can be procured from witnesses, *the probability or improbability of the transaction* formed a most important consideration in ascertaining the truth of any transaction relied upon. With this argument we agree; and therefore it will become our duty to examine with care how far the defence relied upon is consistent with all the probabilities of the case. It has been said also that this defence stands exclusively upon oral evidence; and though, to a considerable extent, that observation may be true, yet it cannot be received to the full extent to which it has been urged. The defence in this case does, it must be admitted, depend upon the proof of a given instrument; but there is a very clear

[1] *Ramamani Ammal* v. *Kulanthai Natchiar*, 14 Moo. Ind. Ap. 354.

distinction, and not an unimportant one, between the pleading a written instrument as an answer to a demand, and the setting up a defence founded exclusively upon oral evidence; for instance, if the defence were adoption, where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are in these cases cast upon it; but where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence; and moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence. There are more means of trying the genuineness of a written instrument, than there can be in disproving purely oral evidence. This is quite manifest even upon the present occasion, for the truth of the transaction may, as it has been, be investigated by reference to the handwriting, to the seal, to the stamps,[1]

[1] Some years ago the Author discovered a forgery in a case which came before him in appeal by examining the stamp. A conveyance purporting to have been executed in 1855 was engrossed on a stamp paper bearing the Royal Arms of England with V. R. and a crown above. *This paper was not manufactured till* 1859, when Her Majesty assumed the Government of India. The paper in use previously bore the arms of the East India Company with the letters E. I. C. The forger had partly erased the letters V. R. and the crown; but the minute device on the arms and the difference of the motto wholely escaped him. The Author has also more than once detected forgeries by the presence or absence of the distinguishing mark impressed on stamps issued before the mutiny—see Act XIX of 1858. It would be very easy to mark all stamp paper with the date of issue by means of an instrument, such as is used to mark Railway tickets: and the Author is convinced that this simple contrivance would do much to stop forgery by facilitating detection. In a large number of forgeries, it is necessary to antedate, and the difficulty of procuring a stamp with a suitable date could be increased if stamp-vendors were made to account more strictly for their sales than is at present the practice. The check of having the purchaser's name endorsed on the stamp is useless, as fictitious names are used. The Author has detected more than one stamp-vendor having stamp-paper *ready endorsed* such fictitious names.

the description of the paper, the alleged habits of him who is said to have written it."[1]

Suspicion not to be substituted for evidence.

§ 57. It is a grave error for a Judge to decide a case upon his own suspicions instead of upon the evidence which the parties have produced. In the case of *Sriman Chandra Dey* v. *Gopal Chandra Chackravarttí*,[2] the Lords of the Privy Council said:—"Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests, *not upon suspicion, but upon legal grounds established by legal testimony.*" In *Kali Chandro Chaudhri* v. *Sib Chandra Bhadúrí*[3] it was said:—"Their Lordships are of opinion that, although no doubt it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery." In the case of *Rammani Ammal* v. *Kulanthai Natchiar*[4] we have already seen it laid down that evidence in a particular case is not to be rejected from a general distrust of native testimony, nor is perjury to be widely imputed without some grave grounds to support the imputation, because such a course would submit the decision of the rights of others to the *suspicions* and not to the deliberate judgment of the Judge. The proper course for a Judge to take in India, when he suspects the truth of the evidence produced before him, is to test that evidence with additional caution, to examine the witnesses with greater

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[1] *Banwari Lal* v. *Hetnarain Singh*, 7 Moo. Ind. Ap. 148.

[2] 11 Moo. Ind. Ap. 28. The above passage was quoted with approbation and followed in the later case of *Faiz Baksh Chaudhrí* v. *Fakíruddín Mahomed Ahasan Chaudhrí*, 9 B. L. R. 458.

[3] 6 B. L. R. 501.

[4] Supra p. 65 *note*.

care, and, if necessary, to use the powers[1] with which he has been vested in this behalf for the purpose of obtaining greater light.

Judge may not import his own knowledge into a case.

§ 58. It is also an error for a Judge to import his own knowledge into a case or to base his decision in any way upon information obtained otherwise than from the evidence submitted to him by the parties in the cause. In the case of *Haropersad* v. *Sheo Dyal*,[2] the Privy Council said :—"It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment, as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness." In a previous case—*Míthan Bibí* v. *Bashír Khan*[3] —it was observed that the conclusion of the Judge seemed to rest principally on his own knowledge and belief or public rumour—"grounds upon which no Judge is justified in acting."[4]

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[1] See Sections 192, 214 and 351 of the Code of Criminal Procedure; Sections 165 and 171 of the Code of Civil Procedure; *ante* p. 36 note 2: and Section 165 of the Evidence Act *post*, and note thereto.

[2] L. R. 3 I. A. 286.

[3] 11 Moo. Ind. Ap. 213.

[4] See also *Súrja Kanth Acharjya* v. *Khúdí Naraiń Manna*, 22 W. R. 9. The same principle applies to an arbitrator (*Kanhai Chand Gosamí* v. *Ram Chandra Gosamí and others*, 24 W. R. 81). When an Assessor based his opinion upon personal knowledge, unsupported by any evidence on the record, a Sessions Judge was held to have committed an error in importing this opinion into his judgment (*R.* v *Ram Charan Karmokar*, 24 W. R. Crim. Rul. 28). As to Jurymen, Mr. Taylor says :—"Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined,

§ 59. The judgment in a case must then be based upon facts which are relevant and duly proved in the proceedings in that particular case:[1] but in dealing with the evidence produced by the parties to prove or disprove the facts in issue, there is great scope for the caution, the acumen, the ability of the Judge. Men differ as widely in discernment and penetration as in stature and physical strength. No rules drawn from the experience of others can supply the want of Nature's gifts or form a complete substitute for personal experience; but here, as in other departments, natural powers may be assisted and individual experience supplemented by suggestions afforded by those who have laboured in the same field. In India especially, where the judicial officer assumes his functions at a comparatively early age, a few such suggestions may prove particularly useful. First then, to use the words of Baron Parke in *Mír Asadúlah alias Shah Chaman* v. *Bibi Imáman*,[2] "there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider *what facts are beyond dispute*, and to examine *which of the two cases best accords with those facts* according to the ordinary course of human affairs and the usual habits of life."

Judgment to be based upon facts relevant and duly proved.

Which case agrees with those facts which are undisputed.

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though there is no necessity for his leaving the box or declining to interfere in the verdict"—see § 1244 and authorities quoted in the note.

[1] So enacted in the first proviso to Section 165 of the Evidence Act—see *post*. A plaintiff instituted two suits against A and B respectively. Both suits were dismissed by the Subordinate Judge. In the suit against A, an appeal was preferred to the High Court. In the suit against B the appeal went to the District Judge, who applied the judgment of the High Court passed on appeal in the suit against A, and decided with reference thereto. *Held* that he was wrong, and that he was bound to decide the appeal in the suit against B upon the evidence on the record.—*Anand Mohan Ghatuk* v. *Surja Kanth Acharjya Chaudhrí*, 22 W. R. 538.

[2] 1 Moo. Ind. Ap. 19: S. C. 5 W. R. P. C. 26—29.

§ 60. Then the *probabilities* of the case, the *probability or improbability of the transaction* alleged may properly be considered in conjunction with the evidence and as a test of its truth or falsehood. In a case already quoted [1] their Lordships of the Privy Council agreed with the argument that, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they may deem necessary for their interest, and the extreme facility with which false evidence can be procured from witnesses, the probability or improbability of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon. In *Sri Ragunadha* v. *Sri Brojo Kishore* [2] it was intimated that, if the Judge had refused to weigh the probabilities of the case because he believed one set of witnesses rather than the other, he would in forming his belief have excluded from his consideration that which ought to have entered into it. In *Banwari Lal* v. *Hetnarain Singh* [3] it was observed that it would be most dangerous to say that, *where the probabilities are in favour of a transaction*, we should conclude against it solely because of the general fallibility of native evidence. In another case [4] it was said—it is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion, and when opposed by the *strong improbability of the transaction* to which they depose or weakened by the mode in which they speak, it may be of little avail. Probabilities are thus an important element of consideration, where the evidence appears unreliable or is directly conflicting; but a case should not be decided upon probabilities alone, apart from the evidence which the parties have submitted to the Court.[5]

Probabilities of the case.

[1] See the remarks of the Privy Council in *Banwari Lal* v. *Hetnarain Singh*, *ante* p. 65.

[2] L. R. 3 I. A. 176.

[3] *Ante* pp. 64, 67.

[4] *Madhú Súdhan Sandyal* v. *Sarúp Chandra Sarkar Chaudhrí*, *ante* p. 63.

[5] See *Lallah Jah* v. *Tallabmatúl Zahra and others*, 21 W. R. 438.

§ 61. It is an error (and one to which young Judicial Officers especially are liable) to fix the attention almost exclusively on some striking portion of the evidence and allow the mind to be borne away to an impulsive conclusion, which a due regard to the other portions of the evidence should considerably modify if not wholly alter. It will also be well to bear in mind the self-evident but often forgotten maxim that *Disbelief is Belief;* only they have reference to opposite conclusions; *e. g.* to disbelieve the existence of a fact is to believe that it was feigned. "The proper opposite to *Belief,* says Archbishop Whately, is either conscious *Ignorance* or *Doubt,* and even Doubt may sometimes amount to a kind of Belief; since deliberate and confirmed doubt, on a question that one has attended to, implies a verdict of *not proven,*—a belief that there is not sufficient evidence to determine either one way or the other. Many persons are of such a disposition as to be nearly incapable of remaining in doubt on any point on which they have once bestowed their attention. They speedily make up their minds and come to *some* conclusion, whether there are any grounds for it or not. Others, again, there are, who are capable of remaining in doubt as long as the reasons on each side seem exactly balanced; but not otherwise. Such a person, as soon as he perceives any—the smallest—preponderance of probability on one side of a question, can no more refrain from deciding immediately, and with full conviction on that side, than he could continue to stand, after having lost his equilibrium, in a slanting position like the famous tower at Pisa. And he will accordingly be disposed to consider an acknowledgment that there are somewhat the stronger reasons on one side, as equivalent to a confident decision. The tendency to such an error is the greater, from the circumstance that there are so many cases in practice, wherein it is essentially necessary to come to a *practical* decision, even where there are no sufficient grounds for feel-

Danger of conclusion based upon part only of the evidence.

Propensity to hasty conclusions.

ing *fully convinced,* that it is the right one.[1] A traveller may be in doubt and have no means of deciding with just confidence which of two roads he ought to take; while yet he must, at a venture, take one of them. And the like happens in numberless transactions of ordinary life, in which we are obliged practically to make up our minds at once to take one course or another, even where there are no sufficient grounds for a full conviction of the understanding. The infirmities above mentioned are those of *ordinary* minds. A smaller number of persons, among whom, however, are to be found a larger proportion of the intelligent, are prone to the opposite extreme—that of not deciding, as long as there are reasons to be found on both sides, even though there may be a clear and strong preponderance on the one, and even though the case may be such as to call for a practical decision. *As the one description of men rush hastily to a conclusion, and trouble themselves little about premises, so the other carefully examine premises and care too little for conclusions. The one decide without inquiring; the other inquire without deciding."*[2]

Opposite error of being unable to make up the mind to any conclusion.

§ 62. In considering the value of the evidence and the arguments thereupon it is no less true in India than in England, that reviling and personality and false charges—attempts to suppress evidence and misrepresentation of argument—afford presumptions that the cause, against which they are brought, is, in the opinion of adversaries at least, unassailable on the side of truth.[3] Occasionally, however, these wea-

[1] There is a difference between *Civil* and *Criminal* cases. In civil cases a preponderance of evidence justifies a decision in favor of one party, more especially where the right is doubtful or there is no *primâ facie* right on either side. In Criminal cases the evidence ought to be conclusive in order to conviction; and, when there is a doubt, the accused should have the benefit of it.

[2] *Elements of Rhetoric,* Part I, Chapter II, § 5.

[3] *Whately's Rhetoric,* Part I, Chap. II, § 4. It is common to find the parties to a case in India styling each other and each other's witnesses, "professional perjurors, or forgers," &c. It is to be wished that the Courts would take a little more trouble than they do to prevent the introduction of scandalous matter.

pons, like perjury and forgery, will be found in India arrayed on the side of a good cause, owing to the ignorance or depravity of those who have the management of it. The tyro may exclaim that the task of discovering truth must be hopeless, if the marks of falsehood are to be found even on the side of truth; but time and experience will teach him that it is possible to separate the wheat from the tares. Even those who have had the benefit of experience will often be in *doubt:* but doubt, be it remembered, is wholy consistent with sound inference and a right conclusion. "There are objections," said Dr. Johnson, "against a *plenum*, and objections against a *vacuum*, but one of them must be true." So there may be truth supported by irrefragable arguments, and at the same time obnoxious to objections numerous, plausible, and by no means easy of solution.[1] On this point also let me quote Archbishop Whately:—"It is in strictly scientific reasoning alone that all the arguments which lead to a false conclusion must be fallacious. In what is called moral or probable reasoning, there may be sound arguments and valid objections on both sides,—*e. g.* it may be shown that each of two contending parties has some reason to hope for success, and this by irrefragable arguments on both sides, leading to conclusions which are not, strictly speaking, contradictory to each other; for, though only one party can obtain the victory, it may be true that each has some reason to expect it. The real question in such cases is, which event is the *more* probable—on which side the evidence preponderates? Now, it often happens that the inexperienced reasoner, thinking it necessary that every objection should be satisfactorily answered, will have his attention drawn off[2] from the arguments of the opposite side, and will be occupied, perhaps, in making

Doubt consistent with accurate inference.

[1] *Dr. Hawkins on Tradition.*

[2] The inexperienced Judicial functionary may in a similar manner have his attention drawn off by a skilful advocate from the arguments of the side opposed to that which he represents.

a weak defence, while victory was in his hands. The objection, perhaps, may be unanswerable, and yet may safely be allowed, if it can be shown that more and weightier objections lie against every other supposition."[1]

The *whole* evidence to be considered.

§ 63. In conclusion the Judge should endeavour to take a comprehensive view of *all* the evidence, all the probabilities on either side; comparing the *whole* of what is arrayed on one side with the *whole* of what is arrayed on the other side; and not suffering his mind and attention to be concentrated unduly on any one portion, lest he consider too perfunctorily or wholly omit to consider other portions either on the same side (where the effect of *combination* is important), or on the opposite side (where the effect of *contradiction* is of consequence). "The consideration of a case upon evidence," said their Lordships of the Privy Council,[2] "can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence, or on proof withheld, in the course of pleading, and tardy production of important portions of a claim or defence be viewed in connection with the oral or documentary proof, which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted." It may be that the generality of men are much better qualified for understanding (to use Lord Bacon's words) "particulars, one by one," than for taking a comprehensive view of a whole; and therefore in a *galaxy* of evidence, as it may be called, in which the brilliancy of no single star can be pointed out, the lustre of the combination is often lost on them.[3] But in this as in other respects, labour and self-training guided by advice and experience, will achieve very satisfactory results.

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[1] *Rhetoric*, Part I. Chap. III. § 7.

[2] *Idem*, Part I. Chap. II. § 4.

[3] In *Rajendra Kishwar Singh* v. *Seoparshan Misser*, 10 Moo. Ind. Ap. 438.

§ 64. When the Judge, having fully considered the evidence, and arrived at his conclusion thereupon, proceeds to embody the result in a judgment, he may bear in mind the following observations of the Privy Council:—"Their Lordships consider that the voluminous judgment of the Civil Judge deserves the credit due to a most painstaking endeavour to arrive at the truth in a difficult case. But its excessive elaboration tends to impair its value by defeating *the proper object of a judgment*, which is to support by the most cogent reasons that suggest themselves the final conclusions at which the Judge has conscientiously arrived. This document records the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial, the effect, often temporary, upon him of a particular piece of evidence or argument of Counsel; it subjects every witness to criticism more or less unfavourable; and from this mass of often conflicting statements, it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests."[1]

Proper object of a judgment.

[1] *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R. 3 I. A. 175.

The following Act of the Governor-General of India in Council received the assent of His Excellency the Governor-General on the 15th March 1872 :—

ACT I OF 1872.

Preamble.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows :—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.—PRELIMINARY.

Short title.

1. This Act may be called "The Indian Evidence Act, 1872 :"

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court, or Officer, nor to proceedings before an Arbitrator;

Commencement of Act.

and it shall come into force on the first day of September 1872.

["British India" means the territories vested in Her Majesty by the 21st and 22nd Vic. Cap. 106, Sec. 1 (passed 2nd August, 1858), with the exception of the Straits Settlement, which, under the provisions of the 29th and 30th Vic. Cap. 115, ceased to be part of India.

As to *affidavits*, see Chapter XVI (sections 194—197) of the Code of Civil Procedure, Act X of 1877.

As to proceedings before *arbitrators*, see Chapter XXXVII (sections 506—526) of the Code of Civil Procedure, Act X of 1877.]

2. On and from that day the following laws shall be repealed :—

Repeal of enactments.

(1.) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India :

(2.) All such Rules, Laws and Regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for ; and

(3.) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

[Clause (1) of this section will preclude the Courts from following English rules of evidence in future.—See Introduction, pages 16—20.

Section 25 of "The Indian Councils' Act, 1861" (24th and 25th Vic. (Cap. 67) is as follows :—"Whereas doubts have been entertained whether the Governor-General of *India*, or the Governor-General of *India* in Council, had the power of making rules, laws and regulations for the territories known from time to time as 'Non-Regulation Provinces,' except at meetings for making laws and regulations in conformity with the provisions of the said Acts of the third and fourth years of King *William* the Fourth, Chapter eighty-five, and of the sixteenth and seventeenth years of Her Majesty, Chapter ninety-five, and whether the Governor or Governor in Council, or Lieutenant-Governor of any Presidency or part of *India*, had such power in respect of any such territories : Be it enacted that no rule, law or regulation which, prior to the passing of this Act, shall have been made by the Governor-General or Governor-General in Council, or by any other of the authorities aforesaid, for and in respect of any such Non-Regulation Province, shall be deemed invalid only by reason of the same not having been made in conformity with the provisions of the said Acts, or of any other Act of Parliament respecting the constitution and powers of the Council of *India* or of the Governor-General, or respecting the powers of such Governors or Governors in Council, or Lieutenant-Governors as aforesaid." This section has been interpreted as prohibiting the making of

rules, &c. for the Non-Regulation Provinces otherwise than at meetings of the Councils for framing laws and regulations; and in consequence none such have been made since 1861. For the legislative powers which may now be exercised by the above named authorities otherwise than at such meetings, see the 33rd Vic. Cap. 3, and the *Introduction* to the Author's *Chronological Table of and Index to the Indian Statute Book*, page 18.

The proviso is important. There are several provisions of statutes of the British Parliament and of Acts of the Indian Legislature which relate to the subject of evidence, and which are in force in India. Such of these as are important will be found in their proper place in the notes that follow. It may be well to remember that the "Evidence Act" does not contain positively the whole of the law of evidence as enacted by the Legislature; but at the same time there are no other Rules of Evidence now in force in India, except such as are contained in this Act or in some other Statute, Act or Regulation in force in British India.]

Interpretation-clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court."

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.

[A Sub-Registrar is a Court—*Sardhari Lal, Petitioner*, 22 W. R. Crim. Rul. 10.]

"Fact."

"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations.

(*a.*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b.*) That a man heard or saw something, is a fact.

(*c.*) That a man said certain words, is a fact.

(*d.*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(*e.*) That a man has a certain reputation, is a fact.

"Relevant."

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

[Chapter II, Sections 5 to 55, treats of the Relevancy of Facts.]

"Facts in issue."

The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

[The law at present in force will be found in Chapter XI, sections 146–151 of Act X of 1877.]

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue:—

That A caused B's death;

That A intended to cause B's death;

That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document."

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

[This definition is the same as that contained in Section 29 of the Penal Code, with the exception of the *last seven words* which have been substituted for "as evidence of that matter."]

Illustrations.

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document.

A caricature is a document.

"Evidence." "Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) all documents produced for the inspection of the Court;

such documents are called documentary evidence.

[The Bill as originally drafted contained a third subdivision included in the definition of "Evidence," namely—

"(3) All material things other than documents produced for the inspection of the Court;

Such things are called material evidence."

An example of such *material* evidence is the weapon or other article of property, which the 198th section of the Code of Criminal Procedure requires to be transmitted to the Court of Session or High Court, when an accused person is committed for trial by either of these Courts. The *Select Committee* stated in their *Second Report* that they had resolved to omit the above provisions relating to material evidence; but they mentioned no reason for this determination. It is to be observed, however, that a Judge can see such things for himself with his own eyes, and the knowledge derivable therefrom is obtained without the use of any *medium*. Witnesses, who have become acquainted with a fact by the use of their own senses, are the *medium* whereby knowledge of that fact is communicated to the Court. A document is the *medium* whereby knowledge of the matters expressed or described therein is conveyed to the Court; but when a blood-stained weapon or a broken box is presented to the Judge's view, all the knowledge derivable therefrom is obtained without the use of any *medium* directly by his own senses. Another kind of material evidence, to which the same remarks apply, is the *inspection of the locality* by the Court. The 58th section of the Common Law Procedure

Act, 1854, provides for the inspection by the Court or a Judge of *any real or personal property, the inspection of which may be material to the proper determination of the question in dispute.* The Indian Code of Civil Procedure contains no provision exactly similar: but section 392 of this Code contemplates a local investigation being conducted by the Judge in person; and Munsifs and other Judges of Civil Courts in the Mufassil usually visit and inspect the locality, when they see occasion to do so. Section 253 of the Code of Criminal Procedure provides for a view by the Jury or Assessors of *the place in which the offence charged is said to have been committed, or any other place in which any other transaction material to the enquiry in the trial took place.*]

"Proved." A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved." A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved." A fact is said not to be proved when it is neither proved nor disproved.

[See the remarks as to Belief, Disbelief, &c. page 71 of the *Introduction.*]

"May presume." **4.** Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume." Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof."

When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[As to *Presumptions*, see Sections 79 to 90, *post*.

The cases where the Court *may* (and *does*) presume and *shall* presume correspond to the *disputable* or *rebuttable* presumptions of other systems of evidence. The last paragraph of the section relating to "Conclusive proof" includes what are called in the same systems *conclusive*, or *imperative*, or *absolute* or *irrebuttable* presumptions.

This Chapter, as originally drafted, contained the following section:—

"Courts shall form their opinions on matters of fact by drawing inferences—

(1) from the evidence produced to the existence of the facts alleged;

(2) from facts proved or disproved to facts not proved;

(3) from the absence of witnesses who, or of evidence which, might have been produced;

(4) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the case."

The *Select Committee* decided to omit this section "as being suitable rather for a treatise than an Act." The object of its introduction was originally stated to be *to point out and put distinctly upon record the fact that to infer, and not merely to accept or register evidence is in all cases the duty of the Court*." Archbishop Whately says: "To *infer* is to be regarded as the proper office of the Judge; to *prove*, of the Advocate." And he defines "inferring" as the ascertainment of the truth by investigation; and "proving," as the [establishment of it to the satisfaction of another.—*Rhetoric, Introduction*, § 1.]

Chapter II.—Of the Relevancy of Facts.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-[existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[For definition of "Facts in issue," see *ante*, Section 3, page 79.]

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a.*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(*b.*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

[The production of documents is regulated by the following sections of the Code of Civil Procedure, Act X of 1877 :—

Production of document on which plaintiff sues.

59. If a plaintiff sue upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Delivery of document or copy.

List of other documents.

If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

Procedure in case of documents not in his possession or power.

60. In the case of any such document not in his possession or power, he shall, if possible, state in whose possession or power it is.

Suits on lost negotiable instruments.

61. In case of any suit founded upon a bill of exchange or other negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced

the instrument in court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

Production of shopbook.

62. If the document on which the plaintiff sues be an entry in a shopbook or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plant, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

The court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification ; and after examining and comparing the copy with the original and attesting the copy if found correct, shall return the book to the plaintiff and cause the copy to be filed.

Inadmissibility of document not produced when plaint filed.

63. A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.

Nothing in this section applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.

Documentary evidence to be in readiness at first hearing.

138. The parties or their pleaders shall bring with them and have in readiness at the first hearing of the suit to be produced when called for by the court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in court, and all documents which the court at any time before such hearing has ordered to be produced.

Effect of non-production of documents.

139. No documentary evidence in the possession or power of any party, the production of which has been called for under section 138, and which has not been produced, shall be received at any subsequent stage of the proceedings, unless good cause be shown to the satisfaction of the court for the non-production thereof. And the Judge receiving any such evidence shall record his reasons for so doing.]

Relevancy of facts forming part of same transaction.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a.*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b.*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c.*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d.*) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

[Similarly Magistrates holding an inquiry into cases triable by the Court of Session or High Court are directed by Section 190 of the Code of Criminal Procedure (Act X of 1872) to take the evidence of the complainant and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accusation *and the attendant circumstances.*]

Facts which are the occasion, cause, or effect of facts in issue.

7. Facts which are the occasion, cause, or effect immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a.*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b.*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c.*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[It was at one time thought necessary in England, and it seems to be still necessary in America, that the conduct should be *contemporaneous*. Of late years, however, this doctrine has been rejected in England, and the rule now is that, although concurrence of time must always be considered as material to show the connection, it is by no means essential. Concurrence of time may, however, be important in estimating the *weight* to be given to the evidence when admitted.

In order to ascertain the real intention of parties to an instrument, evidence of what they have done under it since its execution is relevant. "It may be laid down as a general proposition," says

Mr. Taylor, "that all ancient instruments of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or, in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed."—§ 1091. In the case of the *Attorney General* v. *Drummond*,[1] Lord Chancellor Sugden said:—"Tell me what you have done under such a deed, and I will tell you what that deed means." This application of the general maxim—*optimus interpres rerum usus*—has been somewhat extended of late years, at least in India, and can now scarcely be said to be restricted to ancient documents, *i. e.* documents at least thirty years old. In *Robert Watson & Co.* v. *Mohesh Narain Rai* (24 W. R. 177), the *patta* was less than twenty years old at the time of the institution of the suit; and their Lordships of the Privy Council expressed an opinion that the real intention of the parties was to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by *the conduct of the parties since its execution*. For other instances of the application of the principle see *Nidhi Krishna Bose* v. *Nistarini Dasi*, 13 B. L. R. 420; S. C. 21 W. R. 387: *Chitan Lal* v. *Chattardhári Lal*, 19 W. R. 432: *Girdhar Nagjishet* v. *Ganpat Moroba and Bhágirthibái Kom Morobá*, 11 Bom. H. C. Rep. 129.]

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements: but this explanation is not to affect the relevancy of statements under any other section of the Act.

[In *Doe* v. *Tatham* (4 Bing. N. C. 548) Baron Parke said:—"Where any facts are proper evidence upon an issue, all oral or written declarations, which can explain such facts, may be received in evidence."

As to *statements*, see Sections 32—39, *post*.]

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence or hearing, which affects such conduct, is relevant.

[*R.* v. *Edmunds*, 6 C. & P. 164; *Neile* v. *Jakle*, 2 C. and K. 709.]

[1] 1 Dru. and War. 368.

Illustrations.

(*a.*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b.*) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(*c.*) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d.*) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakíls in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(*e.*) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f.*) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the Police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant.

(*g.*) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 rupees,'—and that A went away without making any answer, are relevant facts.

(*h.*) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i.*) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j.*) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, (one), or

as corroborative evidence under section one hundred and fifty-seven

(*k.*) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (one), or

as corroborative evidence under section one hundred and fifty-seven.

[These last two *Illustrations* are important. Under English law it was decided that the *particulars* of the complaint may not be disclosed by the witnesses for the prosecution either as original or as confirmatory evidence (*R.* v. *Walker* 2 M. & R. 212), but that the details of the statement can only be elicited by the prisoner's counsel on cross-examination. Of late years however some Judges have followed a different practice. "It is difficult," says Mr. Taylor, "to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial"—§ 519. Under the above *Illustrations, the terms* of the complaint are admissible as original evidence.]

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts necessary to explain or introduce relevant facts.

Illustrations.

(*a.*) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b.*) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(*c.*) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

[Declarations made or letters written during absence from home, explanatory of the motive of departure, are admissible as original evidence, since the departure and absence are very properly regarded as one continuing act.—Tay. § 526.]

(*d.*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

[*Hadly* v. *Carter*, 8 New Hamps. R. 40.]

(*e.*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(*f.*) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

[Lord George Gordon's Case—21 How. State Trials, 514, 529.]

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(*a.*) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the

persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

[In connection with the above section the following points should be clearly understood: 1*st*,—The section applies to the case either of an *offence* or of an *actionable wrong*, to joint conspirators and to co-trespassers or other *tort-feasors*. 2*nd*, —Before the evidence is admitted there must be *reasonable ground* to believe in the existenee of a conspiracy. In England it has been usual occasionally for the sake of convenience to allow the acts or declarations of one conspirator to be given in evidence before sufficient proof has been given of the conspiracy, the prosecutor undertaking to furnish such proof at a later stage of the case. 3*rd*,—The connection of the individuals in the unlawful enterprise being shown, every act and declaration of each member of the confederacy is original evidence against every other member, though ignorant of them, and though the persons doing these acts or making those declarations may have been strangers to him. 4*th*,—Those acts and declarations are admissible as evidence though made *before* or *after* the connection with the enterprise of the individual against whom they are used. 5*th*,—A letter giving an account of the conspiracy is admissible, apparently, even though *not written in support of it or in furtherance of it*. This last rule is contrary to that followed in England. See the whole principle discussed.—Tay. §§ 526—534; Best § 508; 1 Phil. Ev. 157—164—see also *The Queen* v. *Amírudín*, 7 B. L. R. 63: and *The Queen* v. *Amír Khan and others*, 9 B. L. R. 36.]

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a*.) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was commit-

ted, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b.*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C, or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D, is relevant.

[See Note to *Illustration* (*b*), section 14, *post*.]

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount or damages which ought to be awarded is relevant.

[As to character affecting damages, see Section 55, *post*.]

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(*a.*) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(*b.*) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

[The *Illustration* shows that this section is intended to apply to *private* as well as *public* rights and customs—and see *Súrjo Naraín Panda* v. *Bissambhar Singh*, 23 W. R. 311. A tenant of a corporation brought an action against a certain person for entering his several fishery in a public navigable river, and in order to prove

the ancient possession of the fishery gave in evidence an "Assembly Book" of the corporation, which contained entries showing that the fishery was let for certain rents to a tenant. It was held that this book was admissible, for the rule is that ancient documents, coming out of the proper custody, and purporting upon the face of them to exercise ownership, such as a lease or a license, may be given in evidence without evidence of possession or payment of rent under them, as being in themselves acts of ownership and evidence of possession (*Malcomson* v. *O'Dea*, 10 H. L. Cas. 593.) In the same case, in order to prove the limits of the several fishery, there were tendered in evidence a bill and an answer in Chancery in a suit instituted a great many years before by another grantee of the Crown against the corporation, and in which the limits of the alleged fishery were described. It was held that they were admissible as part of the history of the fishery and of the claims made to it (see also *Rogers* v. *Allen*, 1 Camp. 309.) The plaintiffs and the defendant were entitled to *pallahs* or turns of worship of certain idols established some two hundred years previously by their ancestors. The plaintiffs contended that, according to the custom which had governed the worship, the idols could not be removed from Calcutta and sought to restrain the defendant from removing them. In support of this contention they tendered in evidence a deed of agreement executed about a year and a half previously by a considerable majority of those entitled to *pallahs*, in which after reciting the alleged custom, the parties to the deed covenanted with one another not to remove the idols from Calcutta during their respective *pallahs*. The defendant was not a party to this deed. It was held that this deed was admissible under the above section, but that it was worthless as evidence against the defendant, against whom the right claimed should be proved *aliunde* (*Haronath Mullick* v. *Nityanand Mullick*, 10 B. L. R. 263.) Road cess papers and a deed of sale were held to be transactions and instances within the meaning of the above section, in which the rights of the plaintiffs and their predecessors had been asserted and recognized (*Daitari Mohanti* v. *Jago Bandhú Mohanti*, 23 W. R. 293.)

Under English law, verdicts, judgments and other adjudications, although *inter alios*, have always been receivable in evidence to show the existence or non-existence of *customs of a public nature*. The admissibility of similar evidence in India for a similar purpose was recognized before the passing of the Evidence Act. In the case of *Madhab Chandra Nath Bishwas* v. *Tomí Bewah and others* (7 W. R. Civ. Rul. 210,) the Calcutta High Court observed as follows:—"Two instances were produced—one in the year 1852, and the other in the year 1862—in which the *right* was

asserted and admitted to exist. These (judicial) proceedings are *good evidence in a matter of public interest*, such as the existence of a custom of this nature, and such a case forms a well-known exception to the usual rule which excludes *res inter alios actæ* (see Taylor on Evidence, Section 1496); and, had a large number of such instances been produced, there is no doubt whatever that the Judge would have been justified in his finding." The same principle was followed by the Madras High Court in *Nallathambi Battar* v. *Nellakumara Pillai* (7 Mad. H. C. Rep. 307), one Judge doubting whether the judgment sought to be used as evidence was upon a matter of such general interest as to make it good evidence against a stranger. In *Sheikh Kúdútúla* v. *Mohini Mohun Saha and others* (V. R. C. and C. R. 290) decisions of the local Courts, when not conflicting, were held to be good evidence of a local custom of pre-emption. Similar evidence has usually been admitted in the Courts in India to prove *Kuláchára* or family custom—see the cases of *Nil Krishto Deb Barmano* v. *Bir Chandra Thakur and others*, (descent of the Tipperah Raj, 3 B. L. R. P. C. 13); *Rawut Urjun Singh and Rawut Dúrjun Singh* v. *Rawut Chunsiam Singh* (Raj of Rawatpore, 5 Moo. In. Ap. 169). Under the above section such evidence is now admissible in support of any kind of right or custom. The plaintiff asserted an *itmámi* tenure in certain lands; and, in support of his case, tendered certain copies of judgments in suits to which a former holder of the superior tenure of the person, who was said to have created the *itmámi* right claimed by the plaintiffs, was a party. These judgments went to prove the existence of the *itmámi* right, but were rejected by the lower Court on the ground that the defendant was no party to the suits in which they were made. The High Court held, that they were relevant under the above section. Couch, C. J., after remarking that they were not relevant under Section 40, 41, or 42, proceeded thus:—"But there are words in Section 43, which introduce another section of the Act. They are—'unless the existence of the judgment is relevant under some other provision of the Act.' And if judgments of the description of those produced by the plaintiff are evidence at all (and we cannot think that it was intended that they should not be), they must be admissible or relevant by Section 13, which says, &c. Here the right, the existence of which was in question was the right of the plaintiff to the *itmámi* lease; and in the suits, in which the decrees were made, this right was claimed and asserted successfully. The word 'transaction' is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not as conclusive, but as of such weight as the Court may think they ought to have. And in this

Section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used. Of course the value of it will be very different where it was given in a suit to which the person against whom it is used was not a party and had no opportunity of contesting the matter, and where he was a party to the suit and had the opportunity of producing any evidence he might think fit. Unless the Indian Evidence Act has excluded judgments and decrees which had previously been always considered as very good evidence, and which are indeed in many cases almost, if not quite, conclusive, it is clear that the decisions referred to were admissible in this case (*Niyamat Ali* v. *Gúrú Dass*, 22 W. R. 365). In the following cases the same principle was followed and previous judgments and proceedings in suits were admitted as *transactions* relevant within the meaning of the above section:—*Kúndu Nath Surma Gosámí* v. *Dhír Chandra Surma Adhikari Gosámí*, 20 W. R. 345: *Rúp Chand Bhakat* v. *Har Kishan Dass*, 23 W. R. 162 (judgment in accordance with and setting out the terms of a compromise): *Mohesh Chandra Brahmachári* v. *Dinú Bandhú Bose*, 24 W. R. 265 (a judgment, which had been reversed on a technical point and not on the merits, held admissible for what it was worth): *Lachmidhar Pattuk* v. *Raghúbar Singh*, 24 W. R. 284 (proceeding in a case in which certain decreeholders sought to attach the *mukarrari* rights of an ancestor of the defendants): *Hunsa Koer* v. *Sheo Gobind Raút*, 24 W. R. 431 (an *ex parte* decree admitted): *Omer Dutt Jah* v. *Colonel James Burn, Manager of the estate of the Durbhunga Raj*, 24 W. R. 407.

Custom.

Custom is an unwritten law established by long usage and the consent of our ancestors. If it be universal, it is a part of the common law of the land: if particular, it is then properly a custom. In order to make a particular custom good under English law there are several essentials. (*First*) It must have been used so long that the memory of man runneth not to the contrary. The time of legal memory in England was by the Statute Westminster the First, 3, Edw. I, A. D. 1276, limited to the reign of Richard I, July 6, 1189. If however the existence of a custom at a distant time be shown, and there is no evidence that at any certain time it did not exist, it may be inferred that it went back as far as the reign of Richard the First *Leuckhart* v. *Cooper*, 7 C and P. 119). (*Second*) It must have been continued; and (*third*) peaceable. (*Fourth*). It must be reasonable; and (*fifth*) certain. It will be void if it be unreasonable, or uncertain or savour too much of arbitrary power (*Wilkes* v. *Broadbent*, 1 Wils. 63). In *Rájá Vurma Valla* v. *Rani Vurmah Mutha* (L. R. 4 I. A. 84) their

Lordships of the Privy Council said, that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law. (*Sixth*) It must be compulsory, and not left to the option of every person, whether he will use it or not. (*Seventh*) It must be consistent with other customs, for one custom cannot be set up in opposition to another. Whether all these requisites are necessary to make a good custom in India, has not, I believe, been decided; but there are many cases in which *reasonableness* and *certainty* have been insisted upon. As to what length of time will constitute the *immemoriality* of a custom, the following remarks of Grey, C. J. may be considered:—"Although in this country we cannot go back to that period which constitutes legal memory in England, *viz.* the reign of Richard I, yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773, which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that, after that date, there can be no subsequent custom, nor any change made in the general law of the Hindús, unless it be by some Regulation by the Governor-General in Council, which has been duly registered in this Court.[1] In regard to the Mufassil, we ought to go back to 1793. Prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain. I admit that a usage for twenty years may raise a presumption in the absence of direct evidence of a usage existing beyond the period of legal memory (*Doe d. Jagomohan Rai* v. *Srímáti Nimú Dasí*, Montriou's Cases of Hindú Law, 596).

Particular evidence relevant to prove custom.

According to the provisions of the above section, where the question is as to the existence of any right or custom, any transaction is relevant by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence. A statement contained in any deed, will, or other document which relates to any such transaction is relevant, if the person by whom such statement was made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense (see Clause 7, Section 32, *post*). The statement,

1 The 13 Geo. III, Cap. LXIII, Section 36, required all laws made by the Governor-General and Council to be registered in the Supreme Court; but this provision was rescinded by the 3 and 4 Wm. IV, Cap. LXXXV, Section 45— [28th August 1833].

written or verbal, giving the opinion of a person, not called as a witness for similar reasons, as to the existence of *any public right or custom*, as to the existence of which he would have been likely to be aware, is relevant, provided it were made before any controversy as to such right or custom had arisen (see Clause 4, Section 32, *post*). When the Court has to form an opinion as to the existence of any *general custom or right*—and this includes customs or rights common to any considerable class of persons—the opinions as to the existence of such custom or right of persons, who would be likely to know of its existence if it existed, are relevant (see Section 48, *post*); and the grounds upon which such opinions are based are also relevant (Section 51, *post*).

Mercantile usage.

Mercantile usage is provable by the multiplication or aggregation of a great number of particular instances showing a given course of business, and a general established understanding respecting it (*Mackenzie* v. *Dunlop*, 3 Macq. H. L. Cas. 22). Speaking of mercantile usage as one of the grounds upon which a plaintiff relied, the Privy Council said:—"To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in its growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract" (*Jago Mohan Ghose* v. *Manikchand and Kaisri Chand*, 7 Moo. In. Ap. 263). There is a distinction between the *general custom* of merchants which is part of the law of the realm and the particular usages of certain particular businesses. The term '*usage of trade*' is to be understood as referring to a particular usage, which is to be established by evidence of instances and cannot be supported by evidence of opinion merely (*Canningham* v. *Faublanque*, 6 C. and P. 44), while the general custom of merchants is in general to be collected from decisions, legal principles, and analogies, though on occasions evidence of such general custom has been received.[1] Evidence of the general opinion of merchants may be given in proof of the custom of merchants (*Camden* v. *Cowley*, 1 W. Bl. 417.) Evidence of usage or custom is often introduced for the purpose of annexing an additional incident to a written contract or of explaining its terms—see proviso 5, Section 92, *post*. See also Section 1 of the Indian Contract Act IX of 1872, which saves usages or customs of trade not inconsistent with the Act; and Section 110 of the same

[1] See 1 Smith's Leading Cases 610—611, 7th edition: and *Edin* v. *The East India Company*, 2 Burr. 1216.

Act, by which an implied warranty of goodness or quality may be established by the custom of any particular trade.

Custom an important portion of Hindú law.

Custom or usage is of especial importance in the administration of Hindú law. In *Doe d. Jagomohan Rai* v. *Srímatí Nímú Dasi* (Montriou's Cases of Hindú Law, p. 595) Grey, C. J. expressed himself as follows:—"I have no hesitation in saying that we are bound to take notice of any special customs which may exist among the Hindús or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindús. Mr. Ellis of the Madras Civil Service has shown that many customs and usages have been adopted from a former people by their Brahminical conquerors, and have become a part of the Hindú Code, although not in any degree founded on the Shastras. It may be said that, from the year 1756 to the year 1765, there was a double Government in this country, and during this period there was no registry of any Regulations. To those who minutely study the history of that period, it must be evident that many usages were then introduced that are now recognized as Hindú customs; and if any of the usages which were introduced at that period are relied upon as law, we are bound to take notice of them, should it be shown to us that they have become the written law of the land. But even if they have not become written law, and they are specially pleaded, we must still recognize them as a valid subsisting custom, on the presumption that this custom had its origin in some lawful authority, and there will be no more difficulty in doing this than there is in recognizing the local customs of England." "Custom," says Strange, "is a branch of Hindú, as it is of our own; law;"[1]—and again, "*usage* being a branch of Hindú law, which, wherever it obtains, supersedes its general maxims."[2] "Immemorial custom," says Manu, "is transcendent law."[3]

"The duty of an European Judge, who is under the obligation to administer Hindú law," said their Lordships of the Privy Council in the case of *The Collector of Madura* v. *Mutu Ramalinga Sathupathi*,[4] "is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has

1 Hindú Law, Ed. of 1830, Vol. I, p. 256.

2 *Idem*, Vol. I, p. 251.

3 Chap. I, p. 138.

4 12 Moo. In. Ap. 436; S. C. 1. B. L. R. P. C. 12; and see *Srímati Matangini Debi* v. *Srimati Jaikali Debi*, 5. B. L. R. 469: *Bhau Nánáji Utpát* v. *Sundrábái*, 11 Bom. H. C. Rep. 249; and *Tara Chand* v. *Rib Ram*, 3 Mad. H. C. Rep. 50, in which two cases the origin and binding force of customary law were discussed.

been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by *usage*; for, *under the Hindú system of law, clear proof of usage will outweigh the written text of the law.* And again—"The compiler of the Mitakshara is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindús is likely to have flowed. The Hindú law contains in itself the principles of its own exposition. The digest *subordinates* in more than one place the language of texts to custom and approved usage" (*Bhyah Ram Singh* v. *Bhyah Agar Singh*, 13 Moo. In. Ap. 390). If an usage have obtained in a country, district, village, nation, tribe, class or family, such usage supersedes the general maxims of the law; but in order to supersede these general maxims, the usage must be such as have been continuously observed from time immemorial or for many generations.[1] When a custom has been proved to exist, it supersedes the general law, which however still regulates all beyond the custom (*Nilkhisto Deb Barmano* v. *Bir Chandra Tukur and others*, 12 Moo. Ind. Ap. 523).

Kulachar and Desachar.

Family custom or usage is termed *kulachar*; and local usage is termed *desachar*. The latter, if it really exists, being a custom prevalent over a whole district, and not confined to one particular estate, must, from its universality, be more easily susceptible of proof than the former. In order to establish *kulachar*, it must be shown that the custom has been ancient and uninterrupted (*Amritnath Chaudhri* v. *Gauri Nath Chaudhri*, 6 B. L. R. 238). In *Nogendro Narain* v. *Raghinath Narain Dey* (Suth. Rep. Jan—July, 1864, p. 20) it was said that, in order to establish a family custom at variance with the ordinary law of inheritance, it is necessary to show that the usage has been ancient and invariable; and it should be established by clear and positive proof. In *Ramalakshmi Ammal* v. *Sivanatha Perumal Sethurayar*,[2] the Privy Council said:—"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India; but it is of the essence of special usages, modifying the ordinary law of succession, that they should be *ancient* and *invariable*; and it is further essential that they should be established to be so *by clear and unambiguous evidence.* It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and

[1] See Babu Shamacharan Sarkar's *Vyavashtá Darpana*, pp. 314 *et. seq.*

[2] 14 Moo. Ind. Ap. 585; S. C. 12 B. L. R. 396. As to the necessity of clear proof, see also *Thakur Durryao Singh* v. *Thakur Dari Singh* (13 B. L. R. 165), in which the mere fact of an estate not having been partitioned for six or seven generations was held by the Privy Council to be insufficient proof of a custom of impartibility.

certainty[1] on which alone their legal title to recognition depends." In *Sivananja Perumal Saithurayar* v. *Athilatchmi Ammal* (3 Mad. H. C. Rep. 77) the Madras High Court said:—"It is not pretended that such a custom has at any time received judicial sanction; and what the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or district of country; and the course of practice upon which the custom rests must not be left in doubt but be proved with certainty."

Discontinuance of family custom.

"A special course of descent in a family, differing from the ordinary course of descent in that place of the property of that class or race, stands on the footing of usage or custom of the family; and, whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both" (*Surendronath Rai* v. *Hiramani Barmanea*, 12 Moo. Ind. Ap. 81). In *Rajkishan Singh* v. *Ram Jai Surma* (I. L. R., 1 Calc. 195) their Lordships of the Privy Council said that they could "not find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous; and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes, and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon."[2]

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[1] It must be certain and intelligible (*Bhagawan Das* v. *Balgobind Singh*, 1 B. L. R. Short Notes ix): precise and conclusive (*Tekaet Dúrga Persad Singh* v. *Tekaetni Dúrga Kúeri*, 20 W. R. 157): must have had a legal origin and have continuance (*Surendronath Rai* v. *Hiramani Barmanea*, 12 Moo. Ind. Ap. 81).

[2] As to usage obtaining in the *Jangal Mahals* of Midnapúr and *other districts*, by which landed estates, the proprietor of which has died intestate, devolve to a single heir to the exclusion of the other heirs of the deceased, see Regulations XI of 1793 and X of 1800, pp. 224–226 and 330—334 of the *Author's Edition of the Bengal Regulations*, where the cases on the subject will be found collected.

Custom recognized by the Legislature.

The obligatory force of custom has been in many instances recognized by the Indian Legislature. Section 5 Act IV of 1872 expressly declares that the rule of decision for the Courts in the Panjáb shall be in part "any custom of any body or class of persons, which is not contrary to justice, equity, and good conscience, and has not been declared to be void by any competent authority;" and Section 7 of the same Act validates all local customs and mercantile usages unless they are contrary to justice, equity, and good conscience, or have been declared to be void by any competent authority. Custom having the force of law in British Burma is recognized by Section 4 of "The Burma Courts Act," XVII of 1875. Section 2 of Bengal Regulation XI of 1825 enacts that, whenever any clear and definite usage as to alluvion and diluvion respecting the disjunction and junction of land by the encroachment or recess of a river, may have been *immemorially established* for determining the rights of the proprietors of two or more contiguous estates divided by a river, the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage. Clause 5 Section 4 of the same Regulation enacts that, in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a river or of the sea, not specifically provided for by that Regulation, the Courts of Justice shall be guided by the best evidence they may be able to obtain of *established local usage*, if there be any applicable to the case, or if not, by general principles of equity and justice.[1]]

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[1] See pp. 582, 605, of the *Author's Edition of the Bengal Regulations*, where the cases will be found collected. With reference to the customs of Ghatwals, see pp. 429—440 of the same work. A number of cases upon family custom will be found at pp. 464 *et seq.* of Part II of Mr. Norton's *Leading Cases on the Hindú Law of Inheritance.*

For other customs, see the following cases :—*Nilmadhub Gosámi* v. *Chandra Mukhi Gosámi*, 22 W. R. 397 (custom of succession of "Bhabak Mahals"):—*Bani Madhab Banerji* v. *Jai Krishna Mukerji*, 7 B. L. R. 152 (tenures transferable):—*Mussamat Kastúra Kúmári* v. *Monokur Deo and others*, Suth. Jan—July, 1864, p. 39 (custom of succession to *Ghátwali* tenures):—*Hur Lal Singh* v. *Jurawan Singh*, Ben. S. D. A. Rep. for 1837, p. 169 (the same):—*Gobinda Das* v. *Ram Sahai Jamadar and others*, 1 Fulton's Rep. 217: and the Vyavastha Darpana of Babú Shama Charan Sirkár, p. 330. As to the succession to Mohunts, see *Ganesh Gir* v. *Omrao Gir*, Ben. S. D. A. Rep. for 1807, p. 218: *Ganga Das and others* v. *Telak Das*, Ben. S. D. A. Rep. for 1810, p. 309: *Narain Das* v. *Bindaban Das*, Ben. S. D. A. Rep. for 1815, p. 151: *Rájá Múttu Ramalinga Setupati* v. *Perianayagum Pillai*, L. R. 1 I. A. 223. (The constitution and rules of religious brotherhoods attached to Hindú temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them): *Rájá Vurma Valia* v. *Rani Vurma Mutha*, L. R. 4, I. A. 84. As to Jains see *Bhagvándás Tejmal* vs. *Rajmal* alias *Hiralal Lachimandas*, 10 Bom. H. C. Rep. 241.

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Facts showing existence of state of mind or of body or bodily feeling.

[As to state of mind or body, see also Clause 2 of Section 21, *post*.]

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

Illustrations.

(*a*.) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

[See Roscoe's Criminal Evidence, p. 92.

Local Custom of pre-emption.

On the subject of a *local custom of pre-emption* amongst persons other than Muhamadans, the following cases may be consulted :—*Ram Dular Misser* v. *Jhumack Lal Misser*, 8 B. L. R. 455 (Hindús in Behar) :—*Fakir Raiyat and others* v. *Sheikh Imam Baksh*, B. L. R. Sup. Vol. F. B. 35, and Sev. Aug.—Dec. 1863, p. 456a (Hindús in Behar—custom presumed, unless contrary be shown, to be founded on and co-extensive with Muhamadan law) :—*Kantyram and another* v. *Wali Sahú*, 2 B. L. R. Civ. Rul. 330 (Hindús in Purnea) :—*Babú Maheshi Lal* v. *G. Christian and others*, 6 W. R. Civ. Rul. 250 (Christians in Bhaugulpore) :—*Seraj Ali Chaudhri* v. *Ramzan Bibi and others*, 8 W. R. Civ. Rul. 204 (Hindú defendant not bound by Muhamadan law, unless there be proof of custom) :—*Munshi Habibál Hósen* v. *Lalla Deoki Nandan*, Suth. Rep. Jan.—July, 1864, p. 74 (to the same effect—24-Parganahs) :—*Dewan Munwar Ali* v. *Syud Azharudin Mahomed and another*, 5 W. R. Civ. Rul. 270 (to the same effect—Tipperah) :—*Nasiruddin Khan* v. *Indra Narain Chaudhri*, 5 W. R. Civ. Rul. 287 (Hindús in Chittagong) :—*Indra Narain Chaudhri* v. *Mahomed Naimudin and others*, 1 W. R. Civ. Rul. 234 (Hindús in Chittagong) :—*Madhab Chandra Nath Biwas* v. *Tami Bewah and others*, 5 W. R. Civ. Rul. 279 (Hindús in Jessore) :—*Jamilah Khatun and others* v. *Pagal Ram and others*, 1 W. R. Civ. Rul. 251 (between Muhamadans and Hindús in Sylhet) :—*Benarsi Das and others* v. *Phúl Chand*, 1 N.-W.-P. Rep. Civ. Ap. 243 (a solitary case or two, not sufficient proof).

In the case of *R.* v. *Parbhudás Ambaxám and others* (11 Bom. H. C. Rep. 90) Parbhudás was charged with having forged a promissory note, and the other four accused with having abetted this offence. In the possession of four of the accused persons were found some one hundred and fifty papers which were alleged to be forgeries or inchoate forgeries. It was decided that these papers were improperly admitted as evidence. The English cases of *R.* v. *Crocker* (2 Leach 987) and *Griffiths* v. *Payne* (11 A. and E. 131) were referred to, and it was held that the Evidence Act did not alter the law as settled thereby. Reference was made to Section 54 and it was observed:—"If the bad character has been reduced to legal certainty by a conviction, evidence of the conviction is admissible. The conviction admits practically of no dispute; but evidence, merely tending to establish another offence, may and generally will be met by counter-evidence raising unmanageable collateral questions. It may be remarked too that the case of a previous conviction being one covered and exceeded by the terms of Section 11 in their widest extension, its subsequent specification shows that the Legislature did not intend those terms to be thus taken, and that the provision for admitting evidence of a previous conviction amounts, as an exact indication of how far in this direction the Legislature meant to go, to an implied exclusion of matters having a remoter and more disputable bearing on the issues under trial, such as the particular facts on which the previous conviction was founded. And if this reasoning applies to such matters, it must apply *a fortiori* to those which are evidence not of a crime actually proved but only of one suspected. The extent of the earlier enactment in this direction is restricted by the more specific provision for the later one."]

(*b.*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

[See Illustration (c) to Section 15, *post*; and *R.* v. *Foster*, 24 L. J. M. C. 134.]

(*c.*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are relevant.

[See *Thomas* v. *Morgan*, 2 C. M. and R. 496; *Kelly* v. *Wade*, 12 Ir. Law R. 424; *Cox* v. *Burbidge*, 13 Com. B. N. S. 430.]

(*d.*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

[See *Gibson* v. *Hunter*, 2 H. Bl. 288.]

(*e.*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

[*Long* v. *Barrett*, 7 Ir. Law R. 439; and *Barrett* v. *Long*, 8 Ir. Law R. 331.]

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f.*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

[*Sheen* v. *Bumpstead*, 1 Hurlstone and Coltman's Rep. 358; S. C. 2 New Rep. 370.]

(*g.*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

[*Gerish* v. *Chartier*, 1 Com. B. 13.]

(*h.*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when

he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i.*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

[*R.* v. *Voke*, R. and R. 531.]

(*j.*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

[*R.* v. *Robinson*, 2 East. P. C. 1110, 1112.]

(*k.*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(*l.*) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(*m.*) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

[See *Aveson* v. *Lord Kinnaird*, 6 East 188.]

(*n.*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o.*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B, is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p.*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(*a.*) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

[*R.* v. *Gray*, 4 F. and F. 1102.]

(*b.*) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c.*) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D, and E, are relevant, as showing that the delivery to A was not accidental.

[See Tay. § 322 and Illustration (b) to Section 14, *ante*.]

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a*.) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

[*Hetherington* v. *Kemp*, 4 Camp. 193.]

(*b*.) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

[*Warren* v. *Warren*, 1 C. M. and R. 250.

The postmark on a letter is *primâ facie* evidence that the letter was in the post at the time and place therein specified.

In English law the matter of this section has usually been dealt with as a *presumption*,—*i. e.* the ordinary course of business was proved and the Court was asked to presume that on the particular occasion in question there was no departure from the ordinary and general rule. The following passage from Mr. Taylor's work will still further illustrate the principle.

"If letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, *primâ facie*, that they reached his hands. The fact, too, of sending a letter to the post-office will in general be regarded by a jury presumptively proved, if it be shown to have been handed to or left with the clerk whose duty it was in the ordinary course of business to carry letters to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post-office all letters that either were delivered to him, or were deposited in a certain place for that purpose."

See also Section 114, and Illustration (*f*) thereto, *post*.]

ADMISSIONS.

Admissions defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

[See the definition of "*document*" in Section 3, *ante*, page 79. A letter does not require a stamp, merely because it contains an admission (*Sithal Persad* v. *Monohar Dass and others*, 23 W. R. 325)].

Admission—by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

[" Where," says Mr. Justice Story, " the acts of the agent will bind the principal, there, his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*. In a suit against a railroad company by a passenger for the loss of his trunk, the admissions of the conductor, baggage-master or station-master as to the manner of the loss, made the next morning in answer to enquiries for the trunk, are competent against the company, it being part of the duties of such agents to deliver the baggage of passengers and to account for the same if missing, and enquiry is made within a reasonable time"—(Story on Agency, § 134). The same learned writer remarks:—" The representation, declaration, or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestæ*." (§ 135.)

The words of the section, "*whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them*," leave it open to the Courts to deal with each case as it arises upon its own merits. Mr. Story's observations, though not founded on precedents binding in India, may yet be valuable, as showing the principles generally applied in a country

in which the decisions of the tribunals are not fettered by technicalities. These principles will be found clearly set forth in paras. 134 to 139a of Mr. Story's work on Agency, which may be usefully referred to. As a general rule, both in England and America, the admissions of an agent have been held binding on the principal only when they have been made during the continuance of the agency in regard to a transaction then depending, and when they have been within the scope of the agent's authority. The admissions of an agent cannot bind an infant, because an infant cannot appoint an agent. As to how far Barristers, Solicitors, and Vakils are agents to bind their clients by admissions, see *ante* p. 29 *note*.

Partners are agents for each other: "Whenever any number of persons are associated together in the joint prosecution of a common enterprise or design, as in commercial partnerships and similar cases, the act or declaration of each member in furtherance of the common object of the association is the act or declaration of all. By the very act of association each partner is constituted the agent of the others for all purposes within the scope of the partnership concern."—(Taylor Ev., § 535, and see Story on Partnership, §§ 101—125.) There is, however, one case in which the admission of a partner cannot be used against his copartners. Section 21 of the Indian Limitation Act (XV of 1877) enacts that one of several joint contractors, *partners*, executors, or mortgagees shall not be made chargeable by reason only of a written acknowledgment signed by, or by the agent of, any other or others of them.

An admission or even a confession of judgment by one of several defendants in a suit is no evidence against another defendant (*Amirtalal Bose* v. *Rajinikanth Mittra*, L. R. 2 I. A. 129).

A common form of admission is a statement made by a party in a former suit either in a written statement or in a deposition (*Harish Chandra Mullick* v. *Prosonno Kumar Banerji and others*, 22 W. R. 303; *Lalla Jugdeo Sahai, &c.* v. *Degambar Rai, &c.*, 22 W. R. 304). Such written statements, when required by law to be recorded, must, in order to be admissible, have been recorded in accordance with the requirements of the law (*Pogha Mahtun, &c.* v. *Gúrú Babú Ganesh Ram*, 24 W. R. 114).]

by suitor in representative character;

Statements made by parties to suits suing or sued in a representative character are not admissions, unless they were made while the party making them held that character.

[The following are instances of persons holding a representative character: the assignee of a bankrupt, an executor or administrator, the manager of a minor's property holding a certificate under Act XL of 1858. As to executors and administrators, see the Indian Succession Act, X of 1865, and the Hindú Wills Act, XXI of 1870.]

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by party interested in subject-matter;

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

by persons from whom interest derived

are admissions if they are made during the continuance of the interest of the persons making the statements.

[It has been decided in England and in America that the admissions of one partner, made *after* the dissolution of the partnership, *in regard to the business of the firm previously transacted,* are admissible as evidence against all the partners (*Loomis and Jackson* v. *Loomis,* 3 Deane's Reports of the Supreme Court of Vermont, 198; *Pritchard* v. *Draper,* 1 Russ. and Myl. 191, 199, 200). As the liability of each partner continues in respect of such transactions, his *interest* may be held to continue also.

The reason of the rule that admissions, in order to be relevant, must have been made *during the continuance of the interest* of the persons making them, is this, that it would be inequitable to allow a person who has parted with his interest in property to divest the right of another claiming under him, by any statement which he may choose to make.

"*Derived their interest.*" It is not sufficient that the interest be *subsequent in point of time*: it must have been *derived from* the person who made the statement sought to be used as an admission. It has been held by the Calcutta High Court that the purchaser of an estate sold for arrears of revenue is not the privy in estate of the defaulting proprietor: he does not derive his title from him, and is bound neither by his acts nor his *laches* (*Munshi Buzlúl Rohoman* v. *Praw Dhan Dutt,* 8 W. R., 222: *Goluk Máni Dasi* v. *Haro Chundra Ghose,* 8 W. R., 62). In the case of *Kúldíp*

Narain Singh v. *The Government of India, Mahadeo Singh and others* (11 B. L. R. 71) their Lordships of the Privy Council said:—"The only advantage which he gains by the character of *auction-purchaser* is, that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *zemindar*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *zemindari*." See also, as to the rights of an auction-purchaser, *Forbes* v. *Mir Mahomed Hosen*, 20 W. R. 44. The purchasers of patni talúks sold under Ben. Reg. VIII of 1819, and of under-tenures sold under Act VIII (B. C.) of 1865, acquire such talúks and tenures free of certain incumbrances (see S. 11 of the Reg. and S. 16 of the Act). Such purchasers are not, however, in the favourable position of purchasers at a sale for arrears of Government revenue. How far they are privies with the previous holders of those tenures has not been definitively settled (see *Tara Persad Mitter* v. *Ram Nrisingh Mitter*, 6 B. L. R. Ap. 5).

There is one rule relating to admissions which has not been embodied *totidem verbis* in the present Code, doubtless because it concerns the weight to be attached to this particular kind of evidence, a matter which is throughout left to the discretion and good sense of the Courts. This rule is, that admissions are relevant only so far as the interests of the persons who made them or of those who claim through such persons are concerned. On this principle a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a *Patnidar* or other holder of a subordinate tenure will be good as against himself and those who derive their title from him, but it will not be relevant against the zemindar or other superior proprietor so as to encumber or diminish *his* rights.]

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions; if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

[See Taylor, § 688. Another instance is the following:—A and B are jointly liable for a sum of money to C, who brings an action against A alone. A objects that he cannot singly or severally be made liable, and that B should be joined as a co-defendant, being jointly liable. An admission by B as to his joint liability is relevant between A and C.]

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute, are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound. A says to B—"Go and ask C, C knows all about it." C's statement is an admission.

["In the application of this principle," says Mr. Taylor, "it matters not whether the question referred be one of law or of fact; whether the person to whom reference is made have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in evidence in an action on contract or in an action for tort." See the subject discussed—Tay. §§ 689—693. There has been some conflict of decision in England as to whether the answer of the referee is conclusive against the party who makes the reference. Mr. Taylor observes that the purposes of justice and policy are sufficiently answered by throwing the burden of proof on the opposing party, as in the case of an award, and by holding him bound, unless he can impeach the test referred to by clear proof of fraud or mistake. In dealing with this question under the Code, the provisions of Section 31, *post*, must be borne in mind.]

Relevancy of admissions against or in behalf of persons concerned.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases :—

(1.) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2.) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

[As to state of mind or body, see also Section 14, page 103, *ante*.]

(3.) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(*a*.) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine; B, that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b*.) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been

taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties if he were dead, under section thirty-two, clause (2).

(*c*.) A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because if A were dead it would be admissible under section thirty-two, clause (2).

(*d*.) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*.) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

[The purchaser of property at an execution sale is the *representative in interest* of the judgment-debtor, whose right, title and interest he has purchased—*Annapúrna Dasí* v. *Nafar Jotdar*, 21 W. R. 148.

With reference to the third clause of this section an admission may be provable on behalf of the person making it by being relevant (otherwise than as an admission) under Section 6 or some one of the sections following it. In addition to Illustrations (*d*) and (*e*) the following may also be given:—

A sues B for falsely representing the solvency of C, in consequence of which A was induced to supply C with goods on credit. A statement made by A at the time, that he trusted C in consequence of B's representation, is admissible on behalf of A under *Explanation* I, Section 8 (*Fellowes* v. *Williamson*, M. and M. 306).

A, the captain of a ship about to sail on a voyage, carefully examines the ship, declares his belief that she is sea-worthy, and embarks on her with his family and property uninsured. The ship is

lost. In an action by the owners on a policy of insurance of the ship and cargo, it is pleaded that the ship was not sea-worthy when leaving port. A's statement is admissible under clause 2, Section 11, *ante*.]

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

[For the rules regulating the admission of secondary evidence of documents, see Section 65, *post*.

The rule here laid down is contrary to that propounded in *Slatterie* v. *Pooley* (6 M. and W. 669) in which it was decided that evidence of the parol admissions of a party as to the contents of a document is admissible "without notice to produce or accounting for the absence of the written instrument, on the ground that such evidence is not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so." This decision was severely criticised. It was remarked that, according to the rule so laid down, what A states as to what B, a party, has said respecting the contents of a document which B has seen, is admissible, whilst what A states respecting a document which he himself has seen, is not admissible,—although in the latter case the chance of error is single; in the former, double. And in an Irish case (*Lawless* v. *Queale*, 8 Ir. Law. Rep. 382) Pennefather, C. J. said:—"The doctrine laid down in that case is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged or had otherwise encumbered it: and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."]

Admissions in civil cases when relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakil from giving evidence of any matter of which he may be compelled to give evidence under section one hundred and twenty-six.

[This section, as drafted in the original Bill, contained "infer that *it was the intention of the parties* that evidence of it should not be given," for "infer that the parties agreed together that," &c.

In the absence of any such express agreement, or implied condition, an offer of compromise will be *some* evidence of liability: but it must be borne in mind that such an offer may be made for the sake of purchasing peace, and without any admission of liability. Much will depend upon the circumstances of each case.

In English law the term "admission" is usually applied to civil transactions and employed in *civil cases;* while the term "confession" is confined to acknowledgments of guilt and *to criminal cases.* This distinction has not been adopted in the Code; for the provisions of Sections 17—22 are as applicable to criminal as to civil cases.]

Confession caused by inducement, threat, or promise, irrelevant.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

[Confessions are divided by English text-writers into *extra-judicial* or those made elsewhere than before a Magistrate or in Court: and *judicial* or those made to a Magistrate or in Court in the due course of legal proceedings. *Extra-judicial confessions* embrace those made as well to private individuals, as to the officers of justice, such as constables, Police officers, &c. If *voluntarily* made, they are receivable in evidence after being proved like other facts. With respect to the confession being voluntary, Chief Baron Eyre said:—"A confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it."

Two kinds of confessions—extra-judicial and judicial.

When the making of the confession appears to the Court to have been caused by any *inducement, threat* or *promise* proceeding from a *person in authority*, the confession must be rejected. According to English law any person having authority over the accused in connection with the prosecution, is a *person in authority* within the meaning of the rule. In *R.* v. *Navroji Dádábhái* (9 Bom. H. C. Rep. 368) *Sargent*, C. J. said:—"No definition or illustration is given of the expression 'person in authority.' It is an expression well known to English lawyers on questions of this nature; and although, as all rules of evidence, which were in force at the passing of the Act, are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides." In this case the prisoner was a booking-clerk in the service of the Great Indian Peninsula Railway; and the person by whom the inducement, threat, or promise was held out, had been previously a travelling auditor of the Company and was at the time engaged in special duty, in the course of which he discovered the defalcations in the accounts in respect of which the charges were made. He was held to be a *person in authority* within the meaning of the above section. The learned Chief Justice said:—"He would clearly be so, I think, according to English authorities. The test would seem to be—had the person authority to interfere with the matter?—and any concern or interest in it would appear to be held sufficient to give him that authority, as in *The Queen* v. *Wa[illegible]ringham* (2 Den. C. C. 447*n*) where Parke, B. held that the wife of one of the prosecutors, and concerned in the management of their business, was a person in authority: and we find the rule so laid down in Archbold's Criminal Practice." Under English law, the following have been held to be

Who is a "person in authority."

persons in authority within the meaning of the rule:—the prosecutor; the master or mistress of the prisoner, where the offence concerned such master or mistress; the constable or other officer having the prisoner in charge; a Magistrate. The master or mistress of a prisoner is not a person in authority, if the offence of which the prisoner is accused was not committed against them. For example, where a servant was accused of the murder of her child and her mistress held out to her an inducement to confess, the confession was held admissible (*R.* v. *Moore*, 3 C. and K. 153).

According to the English authorities the rule holds good, if the inducement, though not actually offered by the person in authority, be held out by any one *in his presence* and he by his silence seem to sanction its being made. This appears not to be the law under the above section, according to which the inducement, threat, or promise must be one *proceeding from* a person in authority.

Inducement from person having no authority.

Whether an inducement, threat, or promise proceeding from a person having *no authority* renders a confession inadmissible, is a question upon which the English decisions have not been uniform. The weight of authority appears to be in favour of the admissibility of such a confession. That it would be admissible under the above section, there appears to be little doubt, as the confession is declared to be irrelevant only when made in consequence of an inducement, threat, or promise proceeding from a person in authority.

The inducement, threat, or promise must *have reference to the charge against the accused person*; and if made as to one charge, will not affect a confession as to a totally different charge. A promise of some collateral boon or benefit, as, for example, to give him some spirits (*R.* v. *Sexton*, 3 Russ. C. and M. 368), to take off his handcuffs (*R.* v. *Green*, 6 C. and P. 655), to let him see his wife (*R.* v. *Lloyd*, 6 C. and P. 393), will not be a bar to the admissibility of the confession.

The inducement, threat, or promise must be sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making the confession he would gain some advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It is for the Court, that is, the Judge or Magistrate, to form an opinion whether the inducement, threat, or promise was under the circumstances sufficient to afford reasonable grounds for sup-

Inducement must be sufficient, &c.

posing that, &c. In cases tried with juries the admissibility of a confession is to be determined by the Judge alone. The advantage to be gained or the evil to be avoided must (1) be of a temporal nature; and (2) must have reference to the proceedings against the accused. Thus where the gaol Chaplain told a prisoner that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done, and the prisoner after this made two confessions to the gaoler and the mayor, these confessions were held to be admissible (*R.* v. *Gilham*, 1 M. C. C. 186). Again, when a man said to a boy charged with murder:—"Now kneel you down. I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty"—and the boy made a statement, it was held to be strictly admissible (*R.* v. *Wild*, 1 M. C. C. 452).

Relevancy of confession to be settled by Court.

The confession will be irrelevant if the making of it appears to the Court to have been caused by any inducement, threat, or promise, &c. Here again it is for the Court, that is, the Judge (not the Jury) or the Magistrate, to determine whether under the circumstances the confession is to be admitted. In *R.* v. *Navroji Dádábhái* (9 Bom. H. C. Rep. 367) Sargent, C. J. said:—"Section 24 leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing." In *R.* v. *Balvant Pendharkar* (11 Bom. H. C. Rep. 138) it was also said that a statement is inadmissible only if the Court considers it to have been made in consequence of any inducement, threat, or promise. In this case the accused for the first time before the Court of Session alleged that the confession was the result of threats and hopes held out to him. There was however no evidence of this, and the High Court were of opinion that, in the absence of evidence, it was not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure was inadmissible. As to the practice in England which may be useful as a guide, Mr. Roscoe says:—"For the purpose of introducing a confession, it is unnecessary, in general, to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place." In *R.* v. *Williams* (2 Russ. by Greaves, 870) Taunton, J. said:—"A confession is presumed

Is preliminary evidence necessary to negative inducement, &c?

to be voluntary, unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted Littledale, J. he added:—"We do not think, according to the usual practice, that we ought to exclude the evidence, because a constable *may have induced* the prisoner to make the statement, otherwise we must in all cases call the Magistrates and constables before whom or in whose custody the prisoner has been." In the previous case of *R.* v. *Swatkins* (4 C. and P. 548) the witness called to prove the confession went into a room in an inn and found the prisoner in charge of a constable. The prisoner motioned the constable to leave the room, which he did, and left them alone. The prisoner then made a statement. It was contended that the constable ought to be called to show that he had used no inducement to make the prisoner confess. Patteson, J. said:—"I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away." In *R.* v. *Warringham* (2 Den. C. C. 447*n*,) it was decided that in order to render a confession admissible, the prosecution must show affirmatively, to the satisfaction of the Judge, that it has not been made under the influence of an improper inducement; and that, if this appears doubtful on the evidence, the confession ought to be rejected. The decisions in England are thus not uniform. It may however be observed that in *R.* v. *Swatkins* the witness to whom the confession was made was a constable; while in *R.* v. *Williams* the witness was not a constable. In India a confession made to a constable is wholly inadmissible. When a confession has been received, and it afterwards appears from other evidence that an inducement, threat, or promise was held out, the proper course for the Judge is to strike the confession out of the record and tell the Jury to pay no attention to it (*R.* v. *Garner*, 1 Den. C. C. 329).

Confessions held admissible.

It may be useful to give a few instances of confessions admitted and rejected. The following have been held to be admissible:—two children, charged with attempting to obstruct a railway train, confessed after they had been apprehended, the mother of one of them having said to them in the presence of a policeman[1]:—you had better as good boys tell the truth (*The Queen* v. *Reeve and Hancock*, 1 C. C. 362):—the prisoner made a statement after he had been called up by his master, who said:—"you are in the presence of two police-officers[1]; and I should advise you that to any question that may

1 In India these would be inadmissible—see Section 36, *post*.

be put to you, you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue:" the master afterwards said:—"take care; we know more than you think" (*The Queen* v. *Jarvis*, 1 C. C. 96). A maid-servant taken into custody on a charge of setting fire to her master's premises was allowed to go with her master's daughter to change her clothes: the master's daughter asked her to tell the truth whether she did it or not: she said "I am innocent": the master's daughter replied "don't run your soul into more sin"—and the servant made a full confession (*R.* v. *Sleeman*, 17 Jur. 1082). The following have been held to be inadmissible:—when the prisoner had been told that he had better pay the money than go to gaol and that it would be better for him to tell the truth (*R.* v. *Navroji Dádábhái*, 9 Bom. H. C. Rep. 369)—"unless you give me a more satisfactory account I will take you before a Magistrate" (*R.* v. *Thompson*, 1 Lea. 291)—"if you will tell me where my goods are, I will be favourable to you" (*R.* v. *Cass*, 1 Lea. 293)—"the watch has been found, and if you do not tell me who your partner was, I will commit you to prison" (*R.* v. *Parratt*, 4 C. and P. 570)—"you had better split and not suffer for all of them" (*R.* v. *Thomas*, 6 C. and P. 353)—and, "I only want my money, and if you give me that, you may go to the devil" (*R.* v. *Jones*, R. and R. 152)—when the accused, a sailor, had been threatened by the captain with a loaded rifle and had then surrendered and been placed in irons (*The Queen* v. *Hicks*, 10 B. L. R. Appen. 1). When a prisoner confessed, knowing that a reward and a pardon had been offered to any but the actual perpetrator of the offence, and under circumstances which led to the belief that his statements were made with the hope of receiving the reward, and being allowed to give evidence as a witness on the part of the Crown, his statements were held inadmissible (*Reg.* v. *Blackburn*, 6 Cox, C. C. 333). But the mere knowledge of such a reward and promise of pardon was held not to render the confession inadmissible, when it did not appear that the inducement thus held out had led the prisoner to confess (*Reg.* v. *Boswell*, Car. and M. 584: *Reg.* v. *Dingley*, 1 C. and K. 637). In the case of *The Queen* v. *Radhanath Dosadh* (8 W. R. Crim. Rul. 53) the prisoner had made a statement under promise of pardon and had then escaped from custody. He was subsequently arrested, and it was held that on his trial this statement could not be given in evidence against him. The Code of Criminal Procedure now enacts (S. 349) that when a pardon is withdrawn because the person who accepted such pardon has not conformed to the conditions under which it was tendered, either by wilfully concealing anything

Confessions held inadmissible.

essential or by giving false evidence, the statement made by such person under pardon may be put in evidence against him.]

Confession made to a Police officer not to be used as evidence.

25. No confession made to a Police officer shall be proved as against a person accused of any offence.

[The reasons which influenced the Legislature in excluding a confession made to a Police officer, or while in the custody of the Police (see the following section) will appear from the following extract from the *First Report of the Indian Law Commissioners*:—

Confessions to Police officers why made inadmissible in India.

"The Police in the provinces of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature, but complaints in cases of the more serious offences are usually laid before the Police darogah, who is authorized to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused and to forward the case to the Magistrate, or submit a report of his proceedings, according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian Affairs during the sessions of 1852 and 1853, and other papers, which have been brought to our notice, abundantly show that the powers of the Police are often abused for purposes of extortion and oppression; and we have considered whether the powers now exercised by the Police might not be greatly abridged. We have arrived at the conclusion that, considering the extensive jurisdiction of the Magistrates, the facilities which exist for the escape of parties concerned in serious crimes, and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it is requisite to arm the Police with some such powers as they now possess; and we have accordingly adopted many of the provisions of the Bengal Code on this head. *In one material point we propose a change in the duties of the Police.* By the existing law, the darogah or other Police officer presiding at an inquiry into a crime committed within his division is required, upon the apprehension of the accused, to 'question him fully regarding the whole of the circumstances of the case and the persons concerned in the commission of the crime, and, if any property may have been stolen or plundered, the person in possession of such property, or the place where it has been deposited. In the event of the accused making free and voluntary confession it is to be immediately written down.' Then follow other provisions for preventing any species of

compulsion or maltreatment with a view to extort a confession or procure information. But we are informed, and this information is corroborated by the evidence we have examined, that, in spite of this qualification as to the character of the confession, *confessions are frequently extorted or fabricated.* A Police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by extorting or fabricating false confessions; and, when this step is once taken, there is of course impunity for the real offenders, and a great encouragement to crime. The darogah is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, who, as far as the Police are concerned, are now perfectly safe. We are persuaded that any provisions to correct the exercise of this power by the Police will be futile; and we accordingly propose to remedy the evil, as far as possible, by the adoption of a rule *prohibiting any examination whatever of an accused party by the Police, the result of which is to constitute a written document.* This, of course, will not prevent a Police officer from receiving any information which any one may voluntarily offer to him; but the Police will not be permitted to put upon record any statement made by a party accused of an offence."

The above section alters the law as laid down in the case of *The Queen* v. *Nabadwip Goswami* (1 B. L. R. O. S. Crim. 23), tried on the original side of the Calcutta High Court, in which it was held that what the prisoner said in answer to questions put to him by a Police officer was admissible, no threat having been used or false hope held out—see *The Queen* v. *Haribole Chandra Ghose*, I. L. R. 1 Calc. 215. In this latter case it was held that the Deputy Commissioner of Police in Calcutta is a *Police officer* within the meaning of the section. "I consider," said Garth, C. J. "that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning." In *The Queen* v. *Macdonald* (10 B. L. R. Appen. 2), his watch, chain and a sum of money had been stolen from the prosecutor as he was travelling by rail to Calcutta. Evidence was tendered of a statement made by the prisoner to the constable who arrested him, to the effect that the watch and Rs. 1,000 had been given to him by his sister, and that he had bought the chain. Phear, J. admitted this evidence, observing

that there is a distinction in the Act between *admissions* and *confessions*.]

Confession made by accused while in custody of Police not to be used as evidence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[Under the provisions of Section 25 a confession made *to a Police officer* is absolutely inadmissible. It would be inadmissible even if made in the presence of a Magistrate. Under the provisions of Section 26 a confession made by a person *whilst he is in the custody of the Police*, is inadmissible unless it be made in the immediate presence of a Magistrate. A confession made to a Police officer in the immediate presence of a Magistrate is thus inadmissible; but a confession made to a person other than a Police officer by a person in the custody of the Police would be admissible, if made in the immediate presence of a Magistrate.]

So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

[Section 150 of the old Code of Criminal Procedure, Act XXV of 1861, ran thus—"deposed to *by a Police officer*," &c. The words in italics were omitted in the amended section substituted by Act VIII of 1869; and the omission has been here retained. As the section stands, the fact may be deposed to by any one.

The words "*in the custody of a Police officer*" might seem to indicate that this section was intended to be a proviso to Section 26 only; and that it does not apply when the information, relating to the fact discovered thereby, constitutes a confession *made to a Police officer*. Whether the proviso governs Section 25 is a question that has not yet been raised and determined, so far as I am aware. In the cases decided upon the section, it seems generally to have been assumed that Section 25 is governed thereby. The above

words would however seem to exclude Section 24 from its operation, and on this point I shall have something further to say below. In the case of *Reg.* v. *Jorá Hasji and others* (11 Bom. H. C. Rep. 244) West, J. said:—"It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. . . . . A man says—'you will find a stick at such and such a place. I killed Rámá with it.' A policeman in such a case may be allowed to say he went to the place indicated and found the stick; but any statement as to the confession of murder would be inadmissible. If instead of 'you will find,' the prisoner has said, 'I placed a sword or knife in such a spot,' where it was found; that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. . . . . If under cover of an explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is sought to introduce a confession of a prisoner to the police, the Evidence Act does not warrant its admission. The rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it. The giving up by a cultivator of a bill-book, or the pointing out of a place where *bájri* appears to have been trampled, is however in itself an unambiguous act. It is in general also insignificant. It needs no explanation, and a confession accompanying it does not explain it, but is a collateral matter, whose exclusion (where it is excluded) is not prevented by its being connected with matters that are not excluded." In *The Queen* v. *Pagarí Shaha* (19 W. R. Crim. Rul. 51) the accused had stated to the Sub-Inspector that he had seized deceased by the neck, and pushed her forcibly down so that she fell against a plantain tree and broke her neck; that he also struck her with his hand; that the woman then and there died; and that he then, after endeavouring to remove the body, took off from it a necklace and pair of bracelets which he concealed in the neighbouring *jangal*. In consequence of this information he was taken to the *jangal* pointed out by him, and he then produced from a concealed place the necklace and bracelets, saying that they were the ornaments which he had removed from the body of the deceased. Glover, J. thought that the portions of the information, which described the assault on the deceased and her consequent death, related distinctly to the fact of the discovery of the ornaments, which

discovery was made in consequence of that information; and that the prisoner's admission[1] as to the way in which he became possessed of those ornaments was a fact which the Law of Evidence allowed to be proved against him. In *The Queen* v. *Ram Charan Chang and others* (24 W. R. Crim. Rul. 36) Jackson, J. observed "upon a prevailing tendency to disregard the provisions of Section 26 and to have recourse, although not justified by facts, to the proviso contained in Section 27."

It has been observed above that the proviso contained in Section 27 would appear not to govern Section 24, because the proviso contemplates the *accused* being *in the custody of the Police.* The following question then arises—if a confession not made to a Police officer or by a person in the custody of the police, be inadmissible under Section 24, in consequence of an inducement, threat or promise; but, if a fact be discovered in consequence of such confession, will so much of the confession as relates distinctly to such fact thereby discovered, be admissible? The rule under English law is that,

Fact discovered by a confession, which is inadmissible owing to inducement, &c.

although a confession may be inadmissible in consequence of an inducement having been offered, yet *any discovery that takes place in consequence of such confession or any act done by the accused, if it be confirmd by the finding of the property,* will be admitted. "Where," says Mr. Taylor, "in consequence of information *unduly obtained* from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found: but it would not be competent to enquire whether he confessed that he had concealed it there. Lord Eldon has laid down the rule somewhat more strictly, saying, in *Harvey's case*, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself

[1] See *The Queen* v. *Macdonald*, *ante* p. 124. There is this difference between the above case and the hypothetical case put by West, J. that the ornaments belonged to the person alleged to have been murdered, while the stick, knife or bill-book is supposed to have belonged to the prisoner.

have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be, that *so much of the confession as relates distinctly to the fact discovered by it may be given in evidence*, as this part at least of the statement cannot have been false. If the prisoner himself delivers up the goods stolen, the fact that this was done upon inducements to confess, held out by persons in authority, will afford no ground for rejecting his declarations contemporaneous with the act of delivery and explanatory of its object, though they may amount to a confession of guilt. But whatever he may have said at the same time, *not qualifying or explaining the act of delivery*, must be rejected. And if, notwithstanding the prisoner's confession, thus improperly induced, and any acts done by him in furtherance of the discovery, the search for the property or person in question is ineffectual, no proof of either the confession or the acts can be received." (§§ 824—825). As to statements accompanying and explaining the act of delivering up property, see Explanation I, Section 8 *ante*.]

Confession made after removal of impression caused by inducement, threat, or promise, relevant.

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise, has, in the opinion of the Court, been fully removed, it is relevant.

[It is for the Court to decide whether the improper influence was totally done away before the confession was made. In this as well as other respects, the admissibility of the confession is a question for the Judge. It constantly occurs that an accused person is brought in by the Police and, being taken at once before a Magistrate, makes a confession, which afterwards at the Sessions he declares to have been made in consequence of threats, promises or ill-usage by the Police. There is too much reason to believe that this statement is not always without foundation. Though the law does not require it, a Magistrate might well, when an accused is brought in by the Police ready to confess, give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to him. A Magistrate can never know whether the Police have threatened or promised; but, by taking the above course, should a threat or promise have been used, he will generally be able to remove the impression caused thereby, and a confession then made will scarcely be open to possible objection.]

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

[The following is an instance of a confession made under a promise of secrecy. A, a fellow-prisoner said to B, who was in custody for murder—"I wish you would tell me how you murdered the boy; pray split." B replied —"Will you be on your oath not to mention what I tell you." A promised on his oath and then B made a confession, which was held admissible—*R.* v. *Shaw*, 6 C. and P. 372.

Promise of secrecy.

The following are instances of confessions obtained by deception. The turnkey of a gaol promised to post a letter for a prisoner; but, instead of doing so, sent it to the prosecutor. It contained matter amounting to a confession, which was held admissible—*R.* v. *Derrington*, 2 C. and P. 418. The prisoner confessed, being led to believe that an accomplice was in custody, which was not so—*R.* v. *Bailey*, 1 Phil. Ev. 104. See also *The Queen* v. *Ram Charan Ghose*, 20 W. R. Cr. Rul. 33.

Deception.

A confession made by a prisoner when drunk is none the less admissible because the liquor was given him to make him intoxicated in the hope that he would make disclosures while in this state.—*R.* v. *Spilsbury*, 7 C. and P. 187.

Drunk.

In *R.* v. *Ellis* (R. and M. 432) a confession elicited by questions put by a Magistrate was held admissible in England. In India the law expressly provides for the examination of the accused person by the Magistrate. When the confession is contained in an answer given by a witness to a question put to him in the witness-box, the provisions contained in Section 132 *post* must be borne in mind. A confession made by a prisoner in a private conversation, which was overheard, has been

Questioning.

held to be admissible—*R.* v. *Simons*, 6 C. and P. 540: *R.* v. *Sugina and another*, 7 W. R. Crim. Rul. 38.

Accused not warned.

It never was required by law in the mufassal that an accused person should be warned that he is not bound to make a confession. In the Presidency Towns and in the case of European British subjects the question of this pre-requisite to the admissibility of a confession was not altogether settled. The matter was discussed in the case of *The Queen* v. *Nabadwip Chandra Goswami and another* (1 B. L. R. O. Crim. 15), in which the accused was tried for an offence committed in Calcutta. He was arrested and taken before a Mufassal Magistrate. His statements made in answer to questions put by this Magistrate, who had not warned him, were held admissible. The Evidence Act has practically followed this decision, and its provisions are applicable to the Presidency Towns and to European British-born subjects.

Effect of extra-judical confessions.

As to the *effect* of *extra-judical confessions*—are they, if uncorroborated, sufficient for conviction? The subject has been much discussed. Mr. Greaves, in a note to *Russell on Crimes*, is of opinion that it never has been expressly decided that the mere confession of a prisoner alone without other evidence is sufficient to warrant a conviction. In all the English reported cases some corroborating circumstance is to be found—(see *R.* v. *Eldridge*, R. and R. C. C. 440: *R.* v. *White*, *id.* 508: *R.* v. *Tippet*, *id.* 509: *R.* v. *Falkner and Bond*, *id.* 481). "In the United States," says Mr. Taylor, "the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient to warrant his conviction; and this opinion certainly best accords with the humanity of the criminal law, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases. Moreover, it seems countenanced by approved writers on this branch of the law." On this point, as on others concerning the *weight* to be assigned to evidence, the Evidence Act leaves the discretion of the Courts unfettered. In a case decided before the Act came into operation, the Calcutta High Court made the following observations:—"The confession of Bechú is conclusive evidence against him, if it be believed. . . . . I do not quite understand why the Sessions Judge told the jury that the confession was evidence, but was not absolutely conclusive. The question for consideration was, whether the confession was voluntary and genuine; and, if no reasonable doubt arose on these points, the confession was legal and sufficient proof of guilt"—*The Queen* v. *Jhari and another*, 7 W. R. Crim.

Rul. 41. If the bare confession of a prisoner be held sufficient for conviction, it ought to be clear and direct, and not by implication merely. The actual words spoken by the prisoner should always be given in detail. The witness's impression of what they meant is not sufficient. In *The Queen* v. *Súbyan* (10 B. L. R. 335) Phear, J. observed:—"Halal says, 'she confessed,' but it is all-important in matters of this kind to know what were the words which the person who is said to have confessed actually used: nothing short of the actual words given in detail in the first person, so far as it is possible to obtain them, ought ever to be relied on as a foundation for the opinion formed by the Court, because it may turn out that the words, taken together with the questions and the circumstances under which the questions were put, do not in truth amount to a confession of guilt such as the witness chose to represent it."

It is a general rule that the whole of the confession must be given in evidence and taken together. "The prisoner," said Abbott, C. J., "is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition with all its limitations was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As the meaning of a writing must in civil cases be collected from the whole taken together, and as, when several instruments relating to the same matter have been executed at one time, they are all resorted to for the purpose of ascertaining the intention of the parties; so here, if one part of a conversation is relied on as proof of a confession of the crime, the prisoner has a right to lay before the Court the whole of what was said in that conversation, or at least so much as is explanatory of the part already proved, and perhaps, *in favorem vitae*, all that was relative to the subject-matter in issue"—*The Queen's Case*, 2 Brod. and Bingh. 297. "There is no doubt," said Bosanquet, J., in *R.* v. *Jones*, (2 C. and P. 629) "that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and, if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the

The whole of a confession to be taken together.

evidence is contradictory to another." Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case.[1] When a prisoner charged with murder stated that he was present when the murder was committed, but took no part in committing it, Littledale, J. told the jury that this statement must be taken all together and was evidence for the prisoner as well as against him; still that they might, if they thought proper, believe one part of it and disbelieve another—*R.* v. *Clewes*, 4 C. and P. 225. So where a prisoner, charged with the theft of cloth, said that it was honestly bought and paid for, Park, J. told the jury that, if they believed that he really bought and paid for the cloth, as he said, they ought to acquit him; but if, from his selling it very soon after it was lost, at the distance of eight miles, they felt satisfied that the statement of his buying it was all false, they would find him guilty. The following cases, decided by the Calcutta High Court before the Evidence Act came into operation, may be referred to—*The Queen* v. *Chokú Khan*, 5 W. R. Crim. Rul. 70: *The Queen* v. *Sheikh Budhú*, 8 W. R. Crim. Rul. 38: *The Queen* v. *Bishú Manjhí*, 9 W. R. Crim. Rul. 16.]

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30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

Illustrations.

(*a.*) A and B are jointly tried for the murder of C. It is proved that A said,—"B and I murdered C." The Court may consider the effect of this confession as against B.

[1] Taylor § 795 and cases there cited.

(*b.*) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—"A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

General rule that confession is evidence only against person who made it.

[The general rule is that the confession of an accused person is not evidence against any one but himself. When a confession implicated other persons by name, it was held that it should be proved in its integrity, including these names; but that it was the Judge's duty to instruct the jury that it was not evidence against any one but the prisoner who made it. Where two persons were charged with the joint commission of an offence, and one of them on his examination before a Magistrate stated in the hearing of the other, that they both jointly committed the offence, and the other did not deny it, it was yet held that this statement of one was not evidence against the other—*R.* v. *Appleby*, 3 Stark 33.

The above section an exception to this general rule.

The above section of the Evidence Act creates a rule opposed to this decision, and forms an important exception to the general principle that the confession of an accused person is evidence against himself only and not against his accomplices. The provisions of the section have received a strict interpretation. It is necessary that the person confessing and the other person against whom his confession is to be *taken into consideration* should be *tried jointly*. When the confessing prisoner pleaded *guilty* and was convicted and sentenced, it was held that he could no longer be considered as one jointly tried with the others—*R.* v. *Kalú Patel and another*, 11 Bom. H. C. Rep. 146. One of several persons charged with dakaity absconded and was arrested and tried subsequent to the others. It was held that the confessions of the persons previously tried could not be taken into consideration against him—*The Queen* v. *Sheik Buxú*, 21 W. R. Crim. Rul. 65. The two persons must be tried for *the same offence*. When the confessing prisoner was tried for dakaity with murder, it was decided that his confession could not be taken into consideration against another prisoner tried at the same time for *abetment* of this offence—*The Queen* v. *Nobo Sikdar*, 19 W. R. Crim. Rul. 64: *Reg.* v. *Amritá Gobindá*, 10 Bom. H. C. Rep. 499. But when A and B were being jointly tried, A for murder and B for abetment of murder, and the charge as against A was altered during the trial to abetment of murder, a confession by A, that he had caused poison to be taken by the

deceased at the instigation of B, was held to have been rightly taken into consideration as against B—*Reg.* v. *Govind Bábli Rául*, 11 Bom. H. C. Rep. 278.

The Court may, under the provisions of the section, take into consideration a *confession* made by one of two or more persons tried jointly for the same offence, as well against any other of such persons affected by the confession as against the person who made it. The statement must amount to a confession of guilt, and as such, it must affect the confessing prisoner himself as well as the other accused against whom it is taken into consideration; and against this latter it should be considered only so far as it substantially implicates the person who has confessed his own actual participation in the commitment of the offence, for which the accused persons are tried jointly. In *The Queen* v. *Mohesh Biswas and others* (10 B. L. R. 455 note; S. C. 19 W. R. Crim. Rul. 16). Phear, J. said:—"It appears to me that this section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration, so far, and so far only, as that particular statement of fact itself extends against the other prisoners, who are being tried as well as himself for the offence which is thus confessed. I think the illustrations which are given to this section bear out this view. If this be so, we must be careful not to apply statements made by A before the Magistrate against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part." In *The Queen* v. *Belat Ali and others*, (10 B. L. R. 458; S. C. 19 W. R. Crim. Rul. 67) the same learned Judge said:—"The view which I take as to the proper application of Section 30 . . . . . is shortly this, namely, that before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. It seems to me that it is this implication of himself by the confessing person which is intended by the Legislature to take the place, as it were, of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. In the case before us neither K — nor B — say anything which amounts to a confession of their own individual guilt upon the charge whereon they were tried jointly with the appellants. Both these men distinctly keep themselves out of all complicity in the actual facts

which are charged against all the prisoners jointly, and upon which the appellants have been convicted with the others; so that it appears to my judgment that the statements which these men make against the appellants are simply, so far as the charge upon which they have been convicted is concerned, statements made without either the sanction of an oath, or of that substitute for that sanction to which I have already referred, namely, the implication of themselves on the charge upon which they have been tried with the appellants—in short, without the application of any test of truth whatever." See also *The Queen* v. *Banwari Lal and others*, 21 W. R. Crim. Rul. 53; and *Reg.* v. *Amritá Gobindá*, 10 Bom. H. C. Rep. 500.

With respect to the words "take into consideration," Jackson, J. said in *The Queen* v. *Chandra Bhattacharjya* (24 W. R. Crim. Rul. 43)—"The section does not provide, as has been repeatedly pointed out by this Court, that such confession is *evidence;* still less does it say, that it shall be the foundation of a case against the person implicated. The Legislature very guardedly says that it may be 'taken into consideration,' and I think the obvious intention of the Legislature in so saying was that, when, as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence." In the same case it was observed that when a written confession is to be used for the above purpose, the person to be affected by it has a right to demand that it be strictly proved and shown to have been in all essential respects taken and recorded as prescribed by law. It may be remarked that as the term "evidence" applies to statements made by *witnesses* (Section 3, *ante*), and as witnesses must be examined on oath or solemn affirmation, this term could scarcely be applied to a statement made by an accused person not upon oath or solemn affirmation.

The statement of a confessing co-accused is affected with the infirmity inherent in an accomplice's testimony; and it is further less valuable in that it is not made under the sanction of an oath, nor can it be tested, developed or explained by cross-examination. It will not therefore be sufficient corroboration of an accomplice's testimony in order to make good a conviction which would have been bad without it—*The Queen* v. *Naga and others*, 23 W. R. Crim. Rul. 24: *The Queen* v. *Jafir Ali and others*, 19 W. R. Crim. Rul. 57: *Reg.* v. *Búdhu Nanku and others*, I. L. R. 1 Bom. 475. An

accused person cannot be convicted solely on the confession of a co-prisoner jointly tried with him for the same offence—7 Mad. H. C. Rep. Appen. xv.: *Reg.* v. *Ambigara Hulagu and another*, I. L. R. 1 Mad. 163.]

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Admissions not conclusive proof but may estop.

[As to estoppels see Section 115 *post*, the note to which may be usefully read with this note. With regard to the effect of admissions, "it is to be observed," says Mr. Taylor, "that the policy of the law favours the investigation of truth by all expedient methods; and that the doctrine of estoppels by which further investigation is precluded, being an exception to the general rule and being adopted only for the sake of general convenience and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded. It is also to be observed that estoppels bind only parties and privies and not strangers"—§ 741. It is therefore a general doctrine that a party is at liberty to prove that an admission made by him was mistaken or untrue, and he is not estopped by it unless another person has been induced thereby to act upon it or to alter his condition. Two defendants in a suit brought against them by a third person as plaintiff pleaded that an instrument constituting a conditional mortgage had been executed by one of them in favour of the other. In a subsequent suit brought by one of them, the alleged mortgagee, against the other, the alleged mortgagor, it was held that the latter was not estopped by this statement from showing that the mortgage was a sham transaction for the purpose of saving the property from falling into other hands. "With regard to the supposed estoppel by pleading," said their Lordships of the Privy Council, "it is clear that a pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them"—*Ram Saran Singh* v. *Mussamat Pran Piyari*, 13 Moo. Ind. Ap. 551. In the case of *Mussamat Ashrafúnnissa Begam* v. *Babu Giridhari Lal* (19 W. R. 118) their Lordships held that the fact of a party having admitted the execution of a deed in a former suit did not prevent her from contesting the validity of the transaction evidenced thereby and showing that it was colourable and not real. See also *Srinath Rai* v. *Bindú Bashini Debi and another*, 20 W. R. 112: *Srimati Debi Chaudhráni* v. *Bimola Sundari Debi* 21, W. R. 422: and *Brojendro Kumar Rai Chaudhri* v. *The Chairman of the Dacca Municipality*, 20 W. R.

223. In this last case Couch, C. J. said:—"Unless it were shown that the defendant had acted upon those representations and was induced by them to become the purchaser, the present plaintiff would not be concluded by them. If they were to be treated merely as admissions by her, and not as having been acted upon, it was allowable to her to show, that they were not true. The modern decisions go so far as to say that even if they had been made fraudulently, she might show what was the truth."

In the case of *Chandra Kant Chukravarti Christian* v. *Piyári Mohun Dutt and others* (5 W. R. Civ. Rul. 209) the question was whether the plaintiff or his mother was the real owner of certain lands. The plaintiff had in several cases admitted that his mother was the owner, and in two suits brought by her for rent in which she based her right to sue upon purchase from him, he had acted as her *mukhtar* and signed her name by procuration. The lands were brought to sale in execution of a decree against her. In a suit by the plaintiff to recover them on the ground that he had only mortgaged them to his mother and that the mortgage-debt had been paid off, it was held that these admissions were evidence against the plaintiff, although they did not amount to an estoppel, inasmuch as they had not been made to the purchaser or any one concerned, and there was no proof that these parties ever heard of them, or were in any way misled by them or had made their purchase in reliance on them.

A Hindú died leaving a widow and a minor son. On the death of the latter the widow became heir, but it was alleged that she had relinquished her rights in favour of her son's wife by a petition in which she had admitted the latter to be co-heir with her son and had allowed her name to be registered as such in the proprietary register. Having regard to the object of this petition, which was intended to obviate an objection which had been taken in a certain suit for redemption, it was held that there was no estoppel—*Mussamat Lado* v. *Mussamat Oodey Kunwar*, I. N-W.-P. Rep. F. B. 23. This decision was confirmed on appeal by the Privy Council (13 Moo. Ind. Ap. 600), their Lordships remarking that the daughter-in-law did not act on the representation contained in the petition or alter her position in any way, being as well acquainted with the facts of the case as the mother; and that the real effect of the petition seemed to be that they two mutually agreed to represent what was not the fact for the purpose of enabling a certain suit to be carried on. In the case of *A. J. Forbes* v. *Mir Mohamed Taki* (5 B. L. R. 540) an admission in a previous suit as to the identity of certain lands, though decided not to be an estoppel, was held

to cast upon the person who made it the burden of showing that what was then deliberately asserted was not the fact. The principle applies when the admission was made under a mistake in respect of legal liability—*Newton* v. *Liddiard*, 18 L. J. Q. B. 53. Where a person under the erroneous impression that the adoption of a second son L, while a first adopted son A was living, was valid, represented in previous suits and in various ways that L was the adopted son of D, it was held that this did not create an estoppel, there being no misrepresentation on any matter of fact, as L was admitted to have been actually adopted, and there being merely an erroneous conclusion that such adoption was valid in law—*Gopí Lal* v. *Mussamat Srí Chandraolí Bahùjí*, P. C. 19 W. R. 13.

In connection with the present subject, it may be mentioned that the acknowledgment of a child as being the offspring of the acknowledger, when the ages of the parties admit of the paternity, and where the descent of the person acknowledged has not been already established from another according to Muhammadan law, amounts not merely to *primâ facie* evidence which may be rebutted, but establishes the fact acknowledged—*Unda Bibi* v. *Syud Shah Janab Ali*, 5 W. R. Civ. Rul. 132: *In the matter of the petition of Mussamat Bibi Najibunissa*, 4 B. L. R. Civ. Ap. 55: *Nobo Kanth Rai Chaudhrí* v. *Mahatab Bibi and another*, 20 W. R. 164: and Baillie's Digest of Mahomedan Law, p. 403. The acknowledgment should be clear and distinct—*Kedarnath Chakravartí* v. *B. Donzelle*, 20 W. R. 352. As to acknowledgment as a brother, see *Mirza Himmat Bahadúr* v. *Sahebzadí Begam and another*, 13 B. L. R. 182; S. C. L. R. 1 I. A. 23.

The whole statement containing an admission ought to be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him cannot be ascertained. See in connection with this point Section 39, *post*. This applies equally to written as to verbal admissions. But though the whole of the statement made at the same time and relating to the same subject must be given in evidence, it does not follow that all the parts of such statement should be regarded as equally deserving of credit; but the jury or the Court must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him—Taylor, §§. 655, 656: *Rájá Nilmaní Singh Deo* v. *Rama-*

nagrah Rai and others, 7 W. R. Civ. Rul. 29: *Radha Charan Chaudhri* v. *Chandra Mani Sikdar and others*, 9 W. R. Civ. Rul. 290: *Pulin Behari Sen* v. *Watson and Co. (Full Bench)*, 9 W. R. Civ. Rul. 190: *Beikanth Nath Khamar* v. *Chandra Mohan Chaudhri*, 1 B. L. Rep. A. C. 133. The principle established by the last two cases is that, if a man makes a qualified statement, that statement cannot be used against him apart from the qualification. If a man, however, make a series of independent unqualified statements, there is nothing to prevent such statements being used separately. In the case of *Beikanth Nath Khamar* the plaintiff sued to recover possession of certain ancestral *jamai* lands, from which he alleged that he had been dispossessed by the defendant. The defendant in his written statement alleged that the plaintiff's ancestor had relinquished the lands; that the zemindar having thus acquired a right to them had leased them to him; that he had been since in possession, and that he had not dispossessed the plaintiff. It was observed that there were two distinct statements of facts made by the defendant—*first*, that the plaintiff's ancestor held the tenure and was in possession up to a certain date; *second*, that on that date the plaintiff's ancestor relinquished the lands, a settlement of which was therefore made with the defendant; that in what was said as to relinquishment and subsequent settlement, there was no qualification whatever of the statement and admission by the defendant, that the plaintiff's ancestor held the tenure for a certain time. It was, therefore, decided that, the defendant having admitted the plaintiff's (ancestor's) possession, it lay on him to prove the relinquishment: and, as he had not done this, that the plaintiff was entitled to succeed. In the case of *Kanwar Durganath Rai* v. *Ram Chundra Sen and others* (L. R. 4 I. A. 52) the plaintiff sued to set aside certain alienations of two-thirds of an ancestral estate on the ground that the estate was endowed *(devutter)* property, dedicated to the worship of an idol, and could not be alienated. The deeds by which the alienations were effected contained certain statements admitting the fact of the property being *devutter*, and these statements were relied upon as estopping the alienees from saying that the property was not *devutter*. The deeds also contained statements that the alienations were made for necessary purposes. The Privy Council considered that these statements must be taken as a whole; and so taking them, it would appear that, granting the lands were *devutter*, the alienations being made for necessary purposes were justifiable. In a suit for enhanced rent the plaintiff averred that the defendant and his predecessors had held the tenure without any change in the rent, but that the tenure had been created long after the permanent settlement. It was decided that the

defendant could not use in his favour the allegation as to the rent not having been changed without being also bound by the allegation of the tenure having been created subsequent to the permanent settlement—*Jadúnath Rai* v. *Rajah Baroda Kanth Rai Bahadur*, 22 W. R. 220. A written statement is not a pleading in confession and avoidance by which the defendant is bound by the confession and so compelled to prove the avoidance. If used against him, as it may be used, the whole statement must be taken together—*Sultan Ali* v. *Chand Bibi and others*, 9 W. R. Civ. Rul. 130; *Pulin Behari Sen* v. *Watson and Co.*, 9 W. R. Civ. Rul. 190.

In several of the cases above referred to, the admissions were contained in the written statements of the parties made in the case under trial. The provisions of the Evidence Act are not restricted to admissions made at any particular time or place, and are wide enough to include admissions made in pleading. The rules of pleading in the Courts in India are very different from the rules followed in England. In connection with the subject one point may here be noticed. There is a rule in English Courts of Law, that *whenever a material averment well pleaded is passed over by the adverse party without denial, it is thereby conclusively admitted.* As to the applicability of this rule to India, the following remarks in the case of *Anand Mayi Chaudhrain* v. *Sib Chandra Rai* (9 Moo. Ind. Ap. 287) may be noticed:—"Their Lordships cannot apply to the pleadings in these Courts the strict rule, that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the plaintiff and Haro Mani, would have dispensed with the necessity of proving the instrument." See also *Shadhú Sing and others* v. *Ramanu Graha Lall and others*, 9 W. R. Civ. Rul. 83. As to the effect of an admission by implication, in the case of *Amirto Lal Bose and others* v. *Rajani Kanth Mittra and another* (15 B. L. R. 23; S. C. 23 W. R. 214) their Lordships of the Privy Council said:—"There is merely an admission *by implication* in the denial of the legal effect imputed to the fact alleged; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact (*Edmonds* v. *Groves*, 2 M. and W. 642: *Smith* v. *Martin*, 9 M. and W. 304: *Robins* v. *Maidstone*, 4 Q. B. 815); and it scarcely needs to be remarked that the effect given in our common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India." It was observed in the same case that it is clear that an admission or

even a confession of judgment by one of several defendants in a suit is no evidence against another defendant.

In recasting the Code of Civil Procedure it was at first proposed to enact that every allegation of fact in any written statement, if not denied specifically or by necessary implication or stated to be not admitted by the opposite party, shall be taken to be admitted for the purposes of the suit. This section was however struck out in Committee, and instead thereof it has been enacted that at the first hearing of the suit the Court shall ascertain from the defendant or his pleader, whether he admits or denies the allegations of fact made in the plaint, and shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made: and shall record such admissions and denials (S. 117 of Act X of 1877). See in connection with this point Section 58, *post*. It has been already observed that, as an infant cannot appoint an agent, he cannot be bound by the admissions of an agent acting for him. But admissions made by the infant himself, may be proved in an action brought against him after obtaining his majority—*O'Neill* v. *Read*, 7 Ir. Law Rep. 434; and see *Dharmáji Varman* v. *Gurrav Shrinivás*, 10 Bom. H. C. Rep. 318. Such admissions might relate to the receipt of goods or to other matters, but would not, of course, affect the question of liability in cases in which a minor would not be liable on a contract unless such contract were ratified by him after obtaining his majority. See Section 11 of the Indian Contract Act, IX of 1872, as to incompetency to contract by reason of nonage.

Admissions by *conduct* are treated by English text-writers under the general head of admissions. For example, the suppression of documents is an admission that their contents are unfavourable to the party suppressing them; the entry of a charge to a particular person in a tradesman's book is an admission that the goods were furnished on his credit; payment of money is an admission against the payer, that the receiver is the proper person to receive it,[1] delay in suing to enforce alleged rights may be construed as an admission of their non-existence—*Jajarnath Sahú*, &c., v. *Syud Shah Mahomed Hosen*, &c. 14 B. L. R. 386: *Rajendronath Haldar* v. *Jogendronáth Banerji*, &c. 14 Moo. In. Ap. 67[1]. The original draft of the Evidence Act contained the following section:—

[1] But not against the receiver that the payer was the person who was bound to pay it, for the party receiving payment of a just demand may well assume without inquiry that the party tendering the money was the person legally bound to pay it.

"The conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done, are relevant facts, when they render probable or improbable any relevant fact alleged or denied in respect of the person so conducting himself."

Admissions by conduct.

The provisions of this proposed section are, however, incorporated in other parts of the existing Act, see Illustrations *(f)*, *(g)*, *(h)*, and *(i)*, to Section 8, Section 11, and Illustrations (*g*) and (*h*) to Section 114.]

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

(1.) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

When it relates to cause of death;

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordi-

or is made in course of business;

nary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker;

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom or matters of general interest;

(4.) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

or relates to existence of relationship;

(5.) When the statement relates to the existence of any relationship [by blood, marriage, or adoption][1] between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed of deceased person;

(6.) When the statement relates to the existence of any relationship [by blood, marriage, or adoption][1] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in

[1] The words in brackets were added by the amending Act, XVIII of 1872.

any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or relates to transaction mentioned in section 13, clause (*a*);

(7.) When the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in section thirteen, clause (*a*).

or is made by several persons, and expresses feelings relevant to matter in question.

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(*a.*) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B: or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(*b.*) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(*c.*) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d.*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e.*) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f.*) Ths question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g.*) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(*h.*) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(*i.*) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(*j.*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price made by a deceased banya in the ordinary course of his business, is a relevant fact.

(*k.*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l.*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(*m.*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A at a given date, is a relevant fact.

(*n.*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

[This is a most important section; and the student, who would comprehend its full scope and meaning, will have to study it carefully. As a general rule, oral evidence must be direct (see section 60, *post*): in other words, if it refers to a fact which could be seen, it must be the evidence of a witness, who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner. It may happen, however, that a witness, who, if present before the Court, could give this direct evidence, is dead, or cannot be found, or has become incapable of giving evidence in consequence of physical or mental injury or disease; or it may be that his attendance cannot be procured without an amount of delay or expense, which, having regard to the circumstances of the case, it would be unreasonable to incur: and it may also be that this witness has made a statement, *either written or verbal*, with reference to the fact (which must be a *relevant* fact) under such circumstances that the truth of this statement may reasonably be presumed. The law here dispenses with direct oral evidence of the fact and with the safeguards for truth provided by cross-examination and the sanctity of an oath, and allows the statement to become evidence, the probability of its being a true statement depending upon other safeguards, which will be noticed in connection with each exception to the general rule—for the eight cases provided for by the eight paragraphs of this section may be regarded in the light of exceptions to the general rule that oral evidence must be direct. They are, in fact, treated by English text-writers as exceptions to the rule that hearsay evidence is inadmissible; but it will be remembered that the phrase "hearsay evidence" is excluded from the Code. The Select Committee in their First Report say, "The phrase 'hearsay evidence,' which is used by "English writers in so vague and unsatisfactory a manner, finds no "place in our draft, and we hope we have avoided the possibility of any "confusion in connection with it. Chapter II provides specifically, "and in a manner which corresponds on the whole (though with some "modifications) with the English law, in what cases the statements "and opinions of third persons as to relevant facts shall, and in what "cases they shall not, be themselves relevant; and Chapter V, on "*Proof by Oral Evidence*, provides that oral evidence shall in all "cases be direct, on whatever ground the fact which it is to establish "may be relevant to the issue; that is to say, if the fact is one which "could be seen, it must be established by a witness who says he saw "it; if it could be heard, by a witness who says he heard it, whether "it is a fact in issue or a collateral fact. These provisions distribute

"the different things described by the phrase 'hearsay evidence.'" The case stands thus, therefore. English writers start by laying down the general rule that "hearsay is no evidence," and then proceed to state the exceptions to this rule, amid the number and intricacy of which the rule itself is too often lost sight of. The Indian Code, on the other hand, while laying down as a general rule that oral evidence must be direct, embodies what might appear to be the exceptions to this rule in separate and distinct rules, regarding the subject-matter of these supplementary rules from an independent stand-point of view afforded by the idea of "relevancy." If this difference in the mode of treating the subject be carefully borne in mind, the following exposition of the section (which follows the order of the section itself) will be the more readily and clearly understood.

I. The first case, in which statements made by persons who cannot be called as witnesses are declared relevant, goes very considerably beyond the rule of English law under which *dying declarations*, as they are called, are admissible; but in order to render them admissible it is necessary that the declarant should have been in *actual danger of death*, that he should have been *aware of this danger* and that *death should have ensued*. The reason why this kind of evidence has been admitted is thus stated by Lord Chief Baron Eyre: "They are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a Court of Justice." "At one time," says Mr. Taylor, "an opinion prevailed that this general principle warranted the admission of dying declarations in all cases, civil and criminal; and it was expressly held by respectable authorities, that the dying declarations of a subscribing[1] witness to a forged instrument were admissible to impeach it. A contrary doctrine, however, has since prevailed, and *it is now settled law, both in England and America that evidence of this description is admissible in no civil case; and, in criminal cases, only in the single instance of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.* Thus, on a trial for rob-

Statements as to cause of death, &c.

[1] It has since been decided that declarations made by a deceased attesting witness respecting the attested instrument are not admissible, though being admissions of fraud or forgery on his own part, and though his handwriting has been proved as proof of the instrument (*Stobart* v. *Dryden*, 1 M. and W 615). But these declarations would be admissible in India, as exposing to a criminal prosecution, see p. 161.

bery, the dying declaration of the party robbed has been rejected: and, where a prisoner was indicted for administering drugs to a woman with intent to procure abortion, her statements *in extremis* were held to be inadmissible..... In Ireland, on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who on his death-bed confessed that he had committed the crime." Mr. Taylor gives three reasons for restricting the application of the principle to cases of homicide,—*first*, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain; *secondly*, the danger of letting in incomplete statements which, though true as far as they go, do not constitute the whole truth; and, *thirdly*, the experienced fact that implicit reliance cannot in all cases be placed upon the declarations of a dying person: for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say or seem to say whatever they chose to suggest. These considerations would be well borne in mind when estimating the *weight* to be allowed to dying statements in particular cases, but they have never been regarded in India as a sufficient argument for the exclusion of this kind of evidence in all cases other than those of homicide. The law on this subject was formerly contained in Section 371 of Act XXV of 1861 and Section 29 of Act II of 1855; and it was decided under those sections that the rule of English law restricting the admission to cases of homicide has no application in India—*The Queen* v. *Bissoranjan Mukherji*, 6 W. R. Crim. Rul. 75. It was here remarked that the law of England on the subject has been much narrowed of late years, and that there are instances in the older books in which dying declarations had been admitted even in civil cases. The Evidence Act now clearly enacts that such statements are relevant, *whatever may be the nature of the proceeding*; and Illustration (*a*) gives an example of a civil as well as of a criminal case. This evidence is not, however, admissible in all civil and criminal cases indiscriminately, *but only in those cases in which the cause of the death of the person, who made the statement, comes in question*; and further, the statement, in order to be relevant, must have reference to *the cause of that person's death or to some of the circumstances of the transaction which resulted in his death.*

There is another important point of distinction between the law contained in the Indian Evidence Act, and the law as administered in England; and, indeed, I may add as previously administered in India. According to English law, the declarant must have been in *actual danger of death* and must have had *full apprehension of his*

danger. With respect to this belief of impending death, Mr. Taylor observes: "*It is not necessary that the declarant should have stated* that he was speaking under a sense of impending death, provided it satisfactorily appears in any mode, that the declarations were really made under that sanction: as, for instance, if the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to in order to ascertain the state of the declarant's mind." Under the Indian Evidence Act the statement is relevant, *whether the person who made it was or was not at the time when it was made under expectation of death*. Whether the declarant was or was not in actual danger of death, and knew or did not know himself to be in such danger, are therefore considerations which will no longer affect the *admissibility* of this kind of evidence in India; but these considerations ought not to be laid aside in estimating the *weight* to be allowed to the evidence in particular cases. The statement is not admissible under English law, unless the death of the person who made it have ensued. Under the Indian Evidence Act the same rule will prevail, inasmuch as the statement is admissible only in cases in which the cause of the *death* of the person who made it comes in question. It cannot, therefore, be admissible until he be dead.[1]

Before, however, the statement is admitted, proof must be given that the person who made it is *dead*, and the burden of proving this is on the person who wishes to give the statement in evidence; see section 104, *post*. Where a Judge is sitting with a Jury, the admissibility of this evidence in any particular case is a question to be decided by the Judge alone; see Section 256 of the Code of Criminal Procedure (Act X of 1872), and the authorities collected in Mr. Taylor's work, § 22, note. The statement will, of course, be admissible only if the person, who made it, being present would be allowed to make the same statement in the witness-box. For example, it would not be admissible if made by a person whom the Court, under the provisions of Section 118, *post*, considered incompetent to testify.

It frequently happens in India that a Magistrate is called upon to take down the statement of a person who has been brought from

1 It may be observed that the words "or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot," &c. in the first part of the section have no application in connection with this first paragraph.

the interior of a district to head-quarters severely injured, or, it may be, in a moribund state. Where the circumstances of the case permit, the statement should be taken in the presence of the accused, and should be written as a formal deposition in accordance with the provisions of Chapter XXV of the Code of Criminal Procedure, Act X of 1872. If this be done, and the injured person die or become incapable of giving evidence at the Sessions, the deposition so taken will be admissible in evidence without further proof—see the explanation to Section 33, and Section 80, *post*. If the statement be not taken down in the presence of the accused and as a formal deposition, it will be none the less *relevant* under the above section; but, before it can be admitted in evidence, it must be proved to have been made by the deceased (*Reg.* v. *Fatá Adáji*, &c. 11 Bom. H. C. Rep. 247); and there is nothing in the law which renders it admissible without such proof because it was taken down by a Magistrate. Such a statement ought to be made, as far as possible, complete in itself; for if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, its value as evidence will be materially affected. It will, of course, be admissible as well for the accused as for the prosecutor. A Police officer is competent to give evidence of a dying declaration made in his presence—see the proviso to Section 121 of the Code of Criminal Procedure.

The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and, as remarked by Mr. Philips, the particulars of the violence may have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his *inferences* from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Any one who has ever taken down the statement of an illiterate man, suffering from severe injuries, will fully realize the truth of these remarks. The deponent, at no time very competent to draw a clear distinction between knowledge obtained through the medium of his own senses, and that which he has heard or imagined, is less than ever able to discriminate when distracted and enfeebled by physical suffering. Falsehood must also be guarded against, and this more especially in India. I have, in the course of my experience, met several cases which strongly impressed me with the necessity of exercising the greatest possible care and discrimination in estimating the value to be assigned to

this kind of evidence; and in more than one instance I have known a statement made by a person who did not expect to live many hours, turn out to be wholly and utterly untrue.[1] "Where a witness," says Mr. Taylor, "has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction." In a country in which the passion of revenge is one of the most remarkable features in the character of the inhabitants, these remarks have a special applicability.

Statements made in the course of business.

II. Statements, written or verbal, of relevant facts, made in the ordinary course of business by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are relevant. The considerations, which have induced the Courts to admit this kind of evidence, appear to be principally these: that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the

[1] The following case came before me some years ago. A woman had two sons who married B and C respectively. The sons went from home on business which detained them a couple of months away, the three women remaining alone. The brother of the headman of the village, who was also a relation, tried to seduce C in the absence of her husband. B saw through his designs, begged him not to disgrace the family, and threatened to tell his wife and their relations. He watched his opportunity and attacked her with a *dao* (a big knife), inflicting the most frightful injuries. He had clearly determined to remove her from his path. The woman was carried into hospital, and, while expected to die every moment, she made a statement to the Magistrate that her injuries had been inflicted by a lunatic living in the same village. She made a miraculous recovery, and having regained strength charged the real culprit, whose brother the headman of the village had invented the story of the lunatic having inflicted the injuries, and had induced her to tell it. She described in a manner that left no doubt as to the truth of her tale, how she was over-persuaded by the whole family, including her own mother, who felt helpless in the absence of her sons; and how the accused had helped to carry her into the hospital and had there remained ostensibly watching over her, but really to prevent her from altering her statement. It was only on her husband's return that her mind got free of these influences, and she told the truth.

due investigation of truth.[1] The value of the evidence will, of course, considerably depend upon the concurrence of two or more of the above circumstances. The leading case in English law on the present subject is that of *Price* v. *The Earl of Torrington*.[2] The facts of this case were as follow:—The plaintiff, a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was this, that the way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, *to which the draymen set their names*, and that the drayman was dead, but that this was his hand set to the book; *and this was held good evidence of a delivery: otherwise of the shop-book itself singly without more.* The following are other instances of the application of the rule. The endorsement of service on a copy of a notice made by an attorney, who served it, was admitted after his death as proof of service. An entry by a deceased solicitor in his diary of his having attended a client on a certain day on her executing a deed of appointment, was held sufficient evidence of the due execution of the deed—*Rawlins* v. *Rickards* 28 Beavan's Rep. 370, and see Illustration (*c*). The entry of the receipt of taxes by a deceased clerk of the Collector, *who was duly appointed*, was admitted as evidence of their payment. The letter-book of a merchant, in which a deceased clerk had made a copy of a letter and a memorandum of having sent the original, was admitted as proof of the sending, and also of the contents of the original, after defendant, having been served with notice, failed to produce it. In the following case the evidence was held *inadmissible*:—It was the ordinary duty of one of the workmen at a coal-pit, named *Harvey*, to give notice to the foreman of the coal sold. The foreman, *who was not present when the coal was delivered*, being himself unable to write, employed a man named Baldwin to make the entries in the books from his dictation, and these entries were read over every night to the foreman. Harvey and the foreman being dead, Baldwin was called with the book to prove delivery of the coal; but the evidence was held inadmissible on the ground that, although the entries made under the foreman's direction might be regarded as made by him, yet as he had no *personal knowledge* of the facts stated in them, but derived his information at second hand from the workmen, there was not the same guarantee for the truth of the entries as in *Price* v. *Torrington*, where the party signing the entry had himself done the

1 Taylor, § 630.

2 See 1 Smith's Leading Cases, 277; 1 Salkeld's Reports, 285; 2 Lord Raymond's Reports, 873.

business (*Brain* v. *Preece*, 11 Meeson and Welsby's Rep. 773). It is a common practice in India for a shop-keeper in a bazár, who cannot himself write, to have his credit-sales entered every evening by a *muharrir* or clerk, who earns a livelihood by performing this duty for some dozen or more shop-keepers residing in the same place. This clerk is seldom or never present when a sale is being made. The shop-keeper tells him from memory the sales of the day, and he enters them accordingly. These entries would seem to be inadmissible for the reason given above, namely, that the *muharrir* had no *personal knowledge* of the sales. Again, a shop-keeper can write figures merely, or can mark a score on a bit of *bambú* or other substance, and these rough accounts supplemented by memory are periodically written up in the *khatá* (a kind of ledger) by this itinerant clerk. Entries so made in a *khatá* would seem to be liable to the same objection.

Under English law entries in the course of business must be shown to have been made *contemporaneously with the facts which they relate* or they will be inadmissible. Amid the hurry and distraction of business, it is argued, the particulars of matters not entered at the time may be forgotten or mis-stated. The provisions of the Indian Evidence Act contain no similar restriction as to the *admissibility* of this kind of evidence; but, in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact which it relates. The sale of a valuable Cashmere shawl might be entered a day or two after without any risk of error, while a retail shop-keeper would have some difficulty in remembering on the following morning the particulars of a couple of dozen articles sold at different prices—this single transaction being one of fifty or a hundred similar sales made on the same day. Even under English law, the question whether the evidence was sufficiently contemporaneous to be admissible, is one to be decided with reference to the circumstances of each particular case. Under the provisions of the Indian Evidence Act, not the *admissibility* but the *weight* of the evidence will depend upon the same circumstances. Entries made in the course of business are, under English law, evidence only of those things, which according to the course of business, it was the duty of the person to enter, and are no evidence of *independent collateral matters*. In the case of *Chambers* v. *Bernasconi*,[1] Lord Denman, delivering the unanimous opinion of the Exchequer Chamber, said—"We are all of opinion that whatever effect may be due to an entry made in the course of

[1] Crompton, Meeson, and Roscoe's Reports, 368; and see 1 Smith's Leading Cases, 330.

any office, reporting *facts necessary to the performance of a duty*, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." This restriction also on admissibility is not to be found in the Indian Evidence Act. The statement or entry, in order to be admissible, under the Act, must relate to a *relevant* fact; and it would appear to make no difference, so far as the question of admissibility is concerned, whether this fact is connected with the performance of a duty, or is merely an independent collateral matter. Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact, the statement of which was matter of duty; and whether this connection was such as to raise a presumption of accuracy of information or observation, must, however, be questions of importance in estimating the *weight* due to such evidence when it relates to collateral matters merely.

Before these statements are admitted it must be shown that the person who made them is dead, or cannot be found, or has become incapable of giving evidence, or that his attendance cannot be procured without an unreasonable amount of delay or expense: and the burden of proving this is on the person who wishes to give the evidence; see Section 104, *post*, and the remarks, *ante* p. 149. Evidence of the *ordinary course of business* will also be necessary, and in connection with this see Illustration (*f*) to Section 114, *post*. Where the statement is a written one, evidence must be given that is in the handwriting of the person alleged to have made it; and this may be done by calling a witness who saw him write it or who is conversant with his handwriting. Sections 34 and 35, *post*, have a certain connection with the present subject. The distinction between the rule just treated of and the provisions of these sections will be pointed out in the Notes to the latter, in which will be also found some description of certain books, &c. peculiar to the ordinary course of business in India. It would not be very easy to give a detailed account of all the documents, receipts, &c. to which the provisions of the law may become applicable: but there is one kind of receipts, a few decisions relating to which may be usually noticed in this place. I allude to *dakhilahs*, or receipts for rent, so common in the experience of judical officers of all grades in India. In the case of *Kritibas Myté* v. *Ram Dhun Kharah* (4 R. C. and C. R. Act X Rul. 5; 7 W. R. 526; 2 Indian Jurist, N. S. 197) it was decided by a Full Bench of the Calcutta High Court, over-ruling certain previous decisions, that *dakhilahs* filed by a *raiyat* and not disputed or denied by his landlord, cannot be presumed to be genuine from such non-denial merely, but must be proved by legal

evidence in the usual way. Approving of certain observations in a previous decision on the same subject, *Peacock, C. J.* further however remarked, that a *raiyat* cannot be expected in every case to summon all the agents of his landlord who gave him receipts; that, if he produces *dakhilahs* and swears that they are genuine documents which were delivered to him by the landowner or his *gomashtah* (agent), or gives other *primâ facie* evidence to show that they are genuine, whether for the purpose of proving that rent has been paid in a suit for arrears, or to prove that rent has been paid at a fixed rate for a certain number of years for the purpose of barring a landlord's claim to enhance, such *dakhilahs* are strong evidence, if the landlord or his agent do not come forward to deny them. See also *Mohabir Singh* v. *Dhiraj Singh and others*, 5. R. C. and C. R. Act X, 19: *Ram Jadú Gangúli* v. *Lakhi Narain Mandal*, 5 R. C. and C. R. Act X, 23 S. C.; 8 W. R. 488: *Ganga Narain Das and others* v. *Saroda Mohan Rai Chaudhri*, 3 B. L. R. 230: *Madhab Chandra Chaudhri, &c.* v. *Rajá Promothonath Rai*, 20 W. R. 266. In the case of *The Queen* v. *Tarini Charan Dey, &c.* (9. B. L. R. Appen. 42) the prisoner was charged with forging a railway bill of lading and was tried at Calcutta. It was proposed to put in a letter from the consignor at Delhi to his partner in Calcutta advising the despatch of the goods; but it was held that such a letter was not a document used in commerce, &c. within the meaning of the above section.

Statements against interest.

III. The admissibility of statements or entries *against the interest* of the person who made them is grounded upon the strong improbability of a man's saying or doing that which is opposed to his own interests. One of the leading cases on this subject is that of *Higham* v. *Ridgway*.[1] Here the question at issue was the exact age of one William Fowden, Junior; and, in order to prove the date of his birth, the Court admitted as evidence an entry of having delivered his mother on a certain day, made by a man-midwife in one of his books, and proved to be in his handwriting, such entry referring to a ledger, in which a charge for attendance was made and marked—PAID.[2] It will be observed that the *date* was in no way against the interest of the person who made the entry, but was wholly collateral to that portion of the entry, *viz.*—"*Paid*," which was against interest, as showing that a certain sum of money was no longer due and owing to such person. On this point Lord Ellenborough, in pronouncing judgment, said:—"It is idle to say

[1] See 2 Smith's Leading Cases, 318; and 10 East's Reports, 109.

[2] It may be observed that Illustration (*b*) is the case of *Higham* v. *Ridgway*, with the portion of the entry which was *against interest* omitted. It is intended to illustrate the rule as to *course of business*, not that as to statements against interest.

that the word '*paid*' only shall be admitted in evidence without the context, which explains to what it refers: we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged." This case is, therefore, a direct authority that statements and entries against interest may be received as evidence of *independent and collateral matters, which, though forming part of the declaration, are not in themselves against the interest of the declarant.* This principle was followed in *Rájá Lílanand Singh* v. *Mussamat Lakhpatí Thakurain*, 22 W. R. 233. The rule has, however, no application in the case of documents containing entries of independent matters, which have no connection with and need not be read to explain the entries which are against interest. Thus in an account rendered by a steward containing on one side items charging himself with the receipt of certain moneys, and on the other side items discharging him by showing how the moneys received had been disbursed, the discharging entries were held not to be admissible in evidence, unless where they were necessary to explain the charging entries or were expressly referred to by them.[1] In such a case in India, however, the provisions of Section 34, *post*, must be borne in mind.

In several English cases it was held that the declarant must be shown to have had *a competent, if not a peculiar, knowledge* of the facts which formed the subject-matter of the declaration. In a later case,[2] however, it was decided that it was not necessary that the person should have his own knowledge of the fact stated; that if the entry charged himself, the whole of it became admissible against all persons; and that the want of such knowledge went to the weight, and not to the admissibility of the evidence. The absence of all restriction in the Indian Evidence Act shows that the principle here laid down has been adopted. It was also decided in England that it is not necessary to the admissibility of this kind of evidence that the declarant should have been competent, if produced as a living witness, to testify to the facts contained in the declaration; nor does it affect the reception of the evidence that these facts are provable by living witnesses, who might be called. Nor is it indispensable that written declarations should be in the handwriting, and bear the signature of the declarant; but they will be received if they were written by him wholly or in part, though not signed; or, if signed by him, though written by a stranger; or, even though not written or signed by him, if proved to have been written by his authorized agent, or to have been

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1 *Doe* v. *Beviss*, 18 Law Journal Reports, C. P. 128; 7 Common Bench Reports, 456, S. C.

2 *Crease* v. *Barrett*, 1 Crompton, Meeson, and Roscoe's Reports, 925; S. C. 5 Tyrrwhit's Reports, 464.

adopted by him. The written statement is, however, inadmissible where there is no proof that it was either written, or signed, or authorized, or adopted by the person against whose interest it militates. Whether these statements will be admissible under the Indian Evidence Act, unless actually *made, i. e.* written by the declarant himself, may be doubtful, having regard to the words of the law, *viz:* "Statements written or verbal, of relevant facts *made* by a person, who is dead," &c. Where written statements are in the handwriting of the declarant, proof of the handwriting should be given in the usual way (see *ante* p. 154). If, however, the entries are thirty years old, this proof *may* be dispensed with under the provisions of Section 90, *post*.

The student will not fail to draw in his own mind the distinction between statements against the interest of the person making them, which are relevant as admissions under Section 18, *ante*, against such persons and his privies only, and the statements now under notice, which are admissible equally against strangers.[1] The *contemporaneousness* of the statement with the facts to which it relates, which, as we have seen (*ante*, p. 153) is a consideration of some importance in connection with statements made *in the course of business*, has never been regarded as material in the case of statements *against interest*, the attention and care ordinarily given by men to concerns in which their interests are involved being supposed to be sufficient guarantees against inaccuracy. It is, however, easy to conceive cases, *e. g.* that of a heedless spendthrift heir, who has just succeeded to an inheritance, in which these guarantees would be of little value. This is, however, a point concerned not with the admissibility but with the weight of the evidence. The same remark applies to the *amount* of interest involved, which is not wont to be very nicely weighed, but upon which the degree of attention likely to secure accuracy must materially depend.

Whether a statement by a party acknowledging the payment of money as due to himself is admissible as a statement against interest, where *such statement is the only evidence of the charge of which it shows the subsequent liquidation*, is a question upon which the authorities under English law are conflicting. The reader will find the subject discussed in Mr. Taylor's work, §§ 609, 610, who considers the preponderance of authority in favor of the admissibility of the evidence. There is nothing in the Indian Evidence Act to prevent the admission of these statements in the particular case stated: but here, as elsewhere, any objection that may be made will go not to the admissibility but to the weight of such evidence. In connection with this point, it will be important to notice a class of

[1] It may seem scarcely necessary to observe that the statements referred to in all the eight paragraphs of Section 32 are relevant against strangers.

statements which may appear to be admissible, either as being against interest or as having been made in the course of business I allude to *indorsements of the payment of interest or of part of the principal* on bonds and similar documents.[1] Such indorsements, if made before the claim became barred by the law of limitation would be against the interest of the payee, inasmuch as he would be unable to recover the sum so indorsed as *paid*; but, if they were made *after* the claim became so barred, they would be *for* and not *against the creditor's* interest, seeing that by admitting a small payment he would be enabled to recover the larger remaining portion of the debt. Whether, then, the indorsement is admissible as an entry against interest depend upon the question whether it was *bonâ fide* made before the claim became barred by limitation. Mr. Taylor (§§ 623—629) carefully discusses the subject, and contends that the indorsement ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it. In the case of *Rose* v. *Bryant* (2 Campbell's Reports, 321), Lord Ellenborough said: "I think you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. Though it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable, whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself.....I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." When the first edition of this work was published, *part payment of interest or principal* did not, under the Indian Law of Limitation (Act XIV of 1859) revive the right to sue for the remainder of a debt. The consideration of the present question was, therefore, of importance only in connection with a class of cases common in India, and as to which there has been some conflict of decision, *viz.*: where a money-bond contains a stipulation that the sum secured thereby shall be payable by instalments, and that, on

[1] It is very common in India for bonds to contain a stipulation that all payments shall be endorsed thereon, otherwise that no allowance will be made therefore. Such a stipulation will not, however, be a bar to proof of payments not so indorsed (*Kali Dass Mitra* v. *Tara Chund Rai*, 8 W. R. 316; *Girdhari Singh and others* v. *Lallú Kánwar*, 3 W. R. Mis. Ap. 23).

default being made in the payment of any one instalment, the whole amount or the aggregate of all the instalments shall become due and payable. Default being made in the payment of one instalment, the cause of action in respect of the whole amount accrues, and limitation therefore begins to run *(Haronath Rai and others* v. *Maherúla Múlah* Full Bench, 7 W. R. 21; *Breen* v. *Balfour*, Bourke's Reports, 120; *Enayatúla Chaudhrí* v. *Haro Chandra Dey*, 2 W. R. 39; but see *Halodhur Bangal* v. *Hogg*, 1 W. R. 189; *Ram Krishna Mahadeb* v. *Bayaji bin Santaji*, 5 Bom. Rep. A. C. 35; and *Baldín* v. *Golap Kúnwar*, I. N.-W.-P. Rep. F. B. 102). The obligee of a bond, who has lost his right of action in this way, may attempt to evade limitation by indorsing the payment of one or more instalments, such indorsement having the semblance of being against interest, but being in reality the very contrary. In cases of this nature it is submitted that, if the indorsement be offered as an *entry against interest*, it should not be admitted unless shown to have been really made at a time when it was actually against the interest of the obligee to make it.

Rule as to part payment altered.

The rule that part payment of interest or principal shall not revive the right to sue for the remainder of the debt was first altered in India by the limitation Act (IX) of 1871. The existing law, which differs in some particulars from that of England, is contained in Section 20 of the last Limitation Act, XV of 1877, which enacts as follows:—"When interest on a debt or legacy is, *before the expiration of the prescribed period*,[1] paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,—or when part of the principal of a debt is, *before the expiration of the prescribed period*,[1] paid by the debtor or his agent duly authorized in this behalf,—a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made: *provided* that, in the case of part payment of the principal of a debt the fact of the payment appears in the handwriting of the person making the same." The express provision that the payment, whether of interest or principal, must, in order to create a new period of limitation, have been made *before the right to sue had become barred*,[2] may seem to require proof of the time of payment in all cases. Where the payment is of part of the principal, the

[1] Of limitation, that is.

[2] It may be observed that under English law an acknowledgment in writing or part payment, made *after* the right to sue has been barred, revives the cause of action. The Indian Limitation Act adopts the views of those Jurists who contend that a legal obligation cannot survive the extinction of the cause of action.

proviso will in most cases afford a security against fraud:[1] but where the payment is of *interest* only, the remarks just made as to instalment-bonds appear to be equally applicable.

Four kinds of interest.

The *interest* against which the statement must militate, in order to be relevant, may be one of four kinds—I. Pecuniary; II. Proprietary; III. Interest in escaping a criminal prosecution; IV. Interest in escaping a suit for damages. Statements, made orally or written in accounts, are the most common instances of the application of the rule to *pecuniary interest*, and this portion of the subject is sufficiently plain to require no further elucidation. With respect to *proprietary* interest, the most common statements are those made by persons while in possession of land, explanatory of the character of that possession. Such statements, if in *disparagement* of the title of the person making them, are clearly against interest. They have been received to show the name of the landlord under whom the declarant held, the amount of the rent, the extent and nature of the tenure. There ought to be some evidence that the declarant was actually in possession, since otherwise his declaration that he has an interest, though limited, may appear to be a statement rather in his favour than otherwise. A careful distinction must be drawn between statements made by an occupier of land in disparagement of *his own title*, and those statements which merely go to abridge or encumber the estate or tenure itself. "For instance," says Mr. Taylor, "if an occupier state that he is only tenant for *life*, this after his death will be admissible evidence against a stranger: but if he admit that the property was intersected by a public highway or that a neighbour had an easement in the land in question, such admission will only bind himself and those who claim under him, and will be inadmissible to establish the highway or the easement as against his landlord or a stranger. The grounds for this distinction are obvious, for, though it is scarcely possible to imagine any inducement which will lead a person possessed of premises in fee to admit that he is only a tenant, many causes might induce a tenant to acknowledge the existence of an easement or a highway, which might be either not inconvenient, or even absolutely beneficial to him." (§ 620.) The same reasoning applies to cases in India. The holder of a rent-free (*lakhiraj*) tenure would be very unlikely to admit that the land was rent-paying (*mal*);[2]

[1] Even here, however, the question may arise, as the writing though made by the payer may be *undated*. In the case of written acknowledgments provided for by Section 19 of the Limitation Act oral evidence is expressly made admissible to prove the *time*. Section 20 contains no similar express provision, but oral evidence is here also without doubt admissible for the same purpose.

[2] For an example of such an admission, however, see *Forbes* v. *Mir Mahomed Taki*, 5, B. L. R. 530.

the holder of a protected tenure would be unlikely to admit that he was a mere ordinary raiyat; but a raiyat with a right of occupancy or holding at a fixed *(mukarrari)* rent, might find it greatly to his advantage to admit an easement for the maintenance of a *bund* or embankment which took up but a small portion of his land, and that of other raiyats, while it secured them a good supply of water necessary for raising a profitable crop. It must, however, be observed that there is nothing in the Indian Evidence Act, which makes the question of admissibility depend upon the distinction just noticed. Here, as elsewhere, any objection that may be made will go, not to the admissibility, but to the weight of the evidence. The Courts in England admit statements made against proprietary interest as evidence not merely of the extent of the declarant's interest in the land, but also of any fact not foreign to the statement, and which forms substantially a part of it. The same rule will doubtless apply in India, but the fact must be a *relevant* fact.

Statement which exposes to criminal prosecution or suit for damages.

In the *Sussex Peerage* case[1] statements made by a deceased clergyman, who had married two persons, were tendered in evidence to prove the marriage, on the ground that they were clearly against his interest, inasmuch as they related to an act which rendered him liable to a criminal prosecution while living. These statements were, however, rejected, Lord Brougham remarking thus—"To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced." Yet this proposition, thus pronounced monstrous and untenable by one who did perhaps more than any other single individual to break down the old barriers against *admissibility*, has come to find favour with more modern reformers, who have carried it into effect to an extent never even contemplated by those who argued and decided the *Sussex Peerage* case—the Indian Evidence Act making the statement admissible, not only if it expose to a criminal prosecution, but also if the interest of the declarant be liable to suffer in a much less serious way, by a suit for damages; and further, the statement is admissible not only when the grave has closed over the person who made it, but also though he may be still living, if he cannot be found, or has become incapable of giving evidence, or if his attendance cannot be procured without an

[1] 11 Clark and Finnelly Reports, House of Lords, 103; and see also *Davis* v. *Lloyd*, 1 Carrington and Kirwan Reports, N. P. 276.

amount of delay or expense, which under the circumstances of the case appears to the Court unreasonable.

The words "would have exposed him" require some observation. They will no doubt be construed to mean "would have exposed him at the time that the statement was made." It could never have been intended that a statement made after the risk had passed away, as for example, after a suit for damages had become barred by limitation or after the expiry of the two years within which prosecutions for offences under the Indian Christian Marriage Act must be instituted (see Sec. 76, Act XV of 1872), should be admitted merely because, if made some months or weeks earlier, it would have exposed to a criminal prosecution or to a civil suit for damages.

Statements giving opinion as to public right or custom or matters of general interest.

IV. We now come to statements giving the opinion of persons as to the existence of any public right or custom, or matter of public or general interest. The ground, upon which these statements are admitted, is thus explained by Mr. Taylor. The origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; in matters, in which the community are interested, all persons must be deemed conversant; as common rights are naturally talked of in public, and, as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject; such concurrence furnishes strong presumptive evidence of truth; and it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share. In estimating the weight to be allowed to this evidence in particular cases in India, the applicability of these reasons to a different state of society may well be taken into consideration. A distinction has been drawn under English law between the meaning of the terms "*public*" and "*general*," the former being applied to that which concerns every member of the State, while the latter is limited to a lesser, though still a considerable portion of the community, as for example, to the persons living in a particular district or neighbourhood. In matters strictly public, reputation from any

one has been held receivable, while in matters of general interest the testimony of persons wholly unconnected with the place has been regarded as inadmissible. So far as *admissibility* is concerned, the Indian Act makes no distinction; but in estimating the weight to be allowed to the evidence in any particular case, it would make a wide difference whether the statement were that of a person living in the vicinity and therefore likely to have information, or that of a person living at a distance and not in the habit of visiting the neighourhood. In connection with this point attention should be paid to the express words of the law—"of the existence of which, if it existed, he would have been likely to be aware." The Indian Evidence Act here follows English law. "It appears," says Mr. Taylor, "that competent knowledge in the declarant is an essential pre-requisite to the admission of his testimony; and, although all the Queen's subjects are presumed to have that knowledge in some degree where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required." (§ 546.) This particular evidence will, however, not be necessary when the statement is that of a person who may fairly be presumed to be acquainted with the matter in question, as for example, in England, of a copy-holder, who may fairly be presumed to be acquainted with the customs of the manor. It was at one time thought in England that proof of the exercise within the period of living memory of the right claimed was a necessary preliminary to the admission of this evidence: but that doctrine has been of late years overruled, and it finds no place in the Indian Evidence Act. It may seem scarcely necessary to remark that these statements are admissible against as well as in favour of a public right or custom, or matter of public or general importance.

The statement declared by the Act to be relevant is a *statement which gives the opinion* of the person making it. The English rule, while it rejects evidence of reputation in regard to *particular facts*, receives it upon general points. All the members of the community have a common and general interest in public and general matters: but particular facts are likely to be known but to few individuals, and may be misrepresented or misunderstood by those who have not personal knowledge of them; while, moreover, they may be connected with other facts, by which if known their effect might be controlled or limited or explained. Statements as to particular facts would appear to be equally excluded by the language of the Indian Act.

The statement, in order to be relevant, must have been made *before any controversy as to such right, custom, or matter had arisen.*

Where there is no dispute or controversy, there is no reasonable probability of bias or other inducement to warp the truth; but once a dispute or controversy has arisen, no one, more especially of those who are interested, remains indifferent; he takes one side or the other, and opinions are hastily, often rashly, formed upon imperfect information. The commencement of the controversy does not mean the commencement of the suit, but the commencement of the dispute, which has ultimately led to litigation. Mr. Taylor deduces the three following propositions from the English decisions upon this portion of the subject: *first*, that declarations will not be rejected in consequence of their having been made *with the express view of preventing disputes; secondly*, that they are admissible, if no dispute has arisen, though *made in direct support of the title of the declarant; thirdly*, that the mere fact of the declarant having stood or having believed that he stood in *pari jure* with the party relying on the declaration, will not render his statement inadmissible. Under English law the controversy which excludes this evidence must have related to the *particular subject in issue*. A dispute as to other points connected with the same matter will have no excluding effect. For example, in a suit between a copy-holder and his lord as to whether a certain customary fine was *to be assessed by the jury* of the lord's Court, depositions in an ancient suit where the controversy turned on the *amount* merely of this fine, were admitted. The words of the Indian Act "before any controversy as to such right, custom, or matter had arisen," may however be held to require a stricter interpretation, and to exclude the statement, when the controversy related to a different point although connected with the same right, custom, or matter. The evidence will be excluded even though the former controversy were *between different parties*, or had reference to *a different property or a different claim*, if the actual matters to which the statement relates were clearly under discussion in the former dispute; and it will be also excluded even though the persons who made the statement were at the time of making it *unaware of the existence of the controversy*. "If an enquiry were to be instituted in each case," said Sir J. Mansfield in the Berkeley Peerage case, "whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced."

The following are a few examples, taken from English decided cases, of instances, in which these statements have been admitted:— where the question related to a manorial custom; to the limits of a town; to the boundaries of a county and parish (when the evidence was offered to prove the boundaries of two private estates, it was

rejected); to a right to claim tolls on a public road; to the fact whether a road was public or private; to a right of ferry; to the fact whether land on a river was a public landing place or not. The evidence was rejected when tendered to prove that a person had a private right of way over another man's land. The Indian decided cases furnish few examples. *Illustration* (*i*) is taken from those parts of the country in which the village system still exists: it has long died out in Lower Bengal. Public rights or customs are little understood; and the order of the Government or of the executive head of a district is generally conclusive as to such. In large *zemindaries* questions however occasionally arise somewhat analogous to those which occur in manors in England, such for example as to the *zemindar's* right to take dues on the sale of trees (*Paul Rai and others* v. *Ram Hit Panday*, 1 N.-W.-P. Rep. 139); or to receive one-fourth of the sale proceeds in cases of involuntary sale, as in execution (*Bijnath Persad* v. *Mahomed Fazal Hossein*, 3 N.-W.-P. Rep. 204).

V. Statement as to relationship, made by person having special means of knowledge.

V. & VI. The fifth and sixth clauses of the section deal with the relevancy of two classes of statements which are usually treated by English text-writers under a single head in discussing the admissibility of certain kinds of evidence in *matters of pedigree*. It will be convenient to deal with the subject-matter of the two clauses in a single exposition, but before proceeding to to do so it may be well to draw attention to the distinction between the kinds of evidence to which each clause refers. The statement declared relevant by the *fifth* clause is a statement relating to the existence of any relationship between persons, *alive or dead* (the language imposes no restriction), as to whose relationship the person making the statement had *special means of knowledge*. The statement provided for by the sixth clause is a statement relating to the existence of relationship between *deceased persons only*. It is not necessary that it should have been made by a person who had special means of knowledge, but *it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait, or other thing on which such statements are usually made*. Both statements alike in order to be relevant must have been made *before the question in dispute was raised* (see *ante*, p. 164). The admission of this evidence is a further exception to the rule (Section 60, *post*), which requires all facts to be proved by direct evidence: *i. e.* facts which can be seen by those who saw

VI. Statement as to relationship between deceased persons made in will, deed, &c.

them; facts which can be heard by those who heard them, &c. "This exception," says Mr. Taylor, "has been recognized on the ground of necessity: for, as in enquiries respecting relationship or descent facts must often be proved which occurred many years before the trial, and were known but to few persons, it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would occasion a grievous failure of justice. Courts of law have, therefore, so far relaxed these rules in matters of pedigree as to allow parties to have recourse to traditional evidence,—often the sole species of proof that can be obtained. Still it is not considered safe to admit such evidence without qualification; and, though it was long doubtful whether the declarations of servants, friends, and neighbours might not be received, the settled rule of admission is now restricted to hearsay proceeding from persons who were *de jure related by blood or marriage to the family in question*, and who, consequently, may be supposed to have had the greatest interest in seeking, the best opportunites for obtaining, and the least reason for falsifying, information on the subject." (§ 571.) Under English law, therefore, the declaration of an *illegitimate* member of the family would be inadmissible.[1] The 47th Section of the repealed Act (II of 1855) rescinded the English rule on this subject, and admitted the declarations *not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state of the family*. The latter portion of this section would have included servants, friends, and neighbours, who are excluded under English law. The propriety of the extension of the rule at least to illegitimate members of the family cannot be doubted, having regard to domestic relations in the East; and the whole section was a strong instance of the tendency of modern reform, which, making *admission* the rule and *exclusion* the exception, leaves it to the Court to estimate the weight to be allowed to particular kinds of evidence in individual cases. The rule now laid down by the Indian Evidence Act is still more general in its terms than the above quoted section of the Act of 1855, which was directed merely to modify the strict rule of English law. It renders admissible the statements not only of persons deceased (whose statements only are admitted in England), but also of persons who cannot be found, or who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay and expense, which, under the circumstances of the case, appears to the Court unreasonable, if such persons had *special means of knowledge* of the relationship to which the statement relates.

1 *Doe* v. *Barton*, 2 Macneal and Robinson's Scotch Appeals, 28; *Doe* v. *Davies*, 10 Adolphus and Ellis' Queen's Bench Reports, N. S. 314.

Proof of this special means of knowledge will be a pre-requisite to the admission of the evidence, and this proof must be given by the party who wishes to give such evidence (see Section 104, *post*). It is a moot point under English law whether the statement of a deceased person, asserting his own illegitimacy, can be received as evidence against third parties. It is, of course, admissible against himself and those who claim under him by a title derived subsequently to the making of the statement. With respect to its admissibility against strangers, it is argued [1] that he could know of his own illegitimacy only by information received from others; but, as a bastard is in the eye of the law *filius nullius* [2] and has no relations, the hearsay must have been derived from strangers, and is therefore inadmissible. This argument has no application in India, where the hearsay not only of *relations*, but also of *strangers*, if they have had special means of knowledge, is admissible. There would appear to be little doubt, therefore, that the statement of a deceased person asserting his own illegitimacy is relevant against strangers under the Indian Evidence Act. Under English law this evidence cannot be successfully objected to on the ground that it is *hearsay upon hearsay*, provided that all the statements come from persons whose declarations on the subject are admissible. Thus, the declarations of a deceased widow respecting a statement which her husband had made to her, as to who his cousins were; the declaration of a relative in which he asserted generally that he had *heard* what he stated; and even general repute in a family, proved by the testimony of a surviving member, have been admitted. It may be doubtful whether these statements could be admitted under the *fifth* clause of the section of the Indian Evidence Act. *Special means of knowledge*, having regard to the meaning usually given to these words, might be held scarcely to include opportunities of hearing that, of the truth of which the hearer had no personal means of judging. So far as the *sixth* clause is concerned, there is no restriction on admissibility. It is improbable that any person would insert in a solemn deed, will, &c. any matter, the truth of which he did not know or had not satisfactorily ascertained.

We have seen that in matters of *public* or *general* interest declarations as to *particular facts* are excluded. The same rule does not, however, apply here. "In cases of general right which depend upon immemorial usage," said Sir J. Mansfield in the Berkeley Peerage case, [3] "living witnesses can only speak of their

[1] Taylor, Vol. I. §§ 572, 573. [2] "The son of nobody."
[3] 4 Campbell's Reports, 415.

own knowledge to what passed in their own time; and, to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and the family transactions among the relations of the parties. Therefore, what is dropped in conversation upon such subjects may be presumed to be true."

Mr. Taylor expresses an opinion that this evidence must be *confined to such facts as are immediately connected with the question of pedigree*, and that declarations as to *independent* facts from which the date of a genealogical event may be *inferred*, will probably be rejected. In a question of legitimacy, turning upon the *time* of birth, a declaration by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, was tendered in evidence, coupled with proof of the time when her own child was born, for the purpose of fixing the alleged bastard's birth at a period subsequent to its parent's marriage. Mr. Baron Gurney admitted the evidence, but Lord Cottenham held it to be inadmissible. The suckling of the child had no *direct* bearing on its age or legitimacy, but was only a species of circumstantial evidence.[1] Where, however, the question at issue related to the relative seniority of three sons, born at a birth, declarations by the father that he had christened them Stephanus, Fortunatus, and Achaius, according to the order of the names in St. Paul's First Epistle to the Corinthians, for the purpose of distinguishing their seniority; and also declarations by an aunt, who was present at the confinement and with a similar object tied strings round the arms of the second and third child, were admitted, as bearing *directly* on the fact to be proved. It was once thought that these declarations would not be received to prove the *place* where any of the events of pedigree occurred, but this proposition has been doubted; and, in *Shields* v. *Boucher*,[2] Vice-Chancellor Knight Bruce intimated a strong opinion that, in a con-

[1] Consider Section 11, *ante*, if such a case arises in India.

[2] De Gex and Smale's Chancery Reports, 50, 56.

troversy merely genealogical, declarations made by a deceased person as to where he or his family came from, "of what place" his father was designated, and what occupation his father followed, would be admissible and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Declarations by a deceased person, that "he was going to visit his family at such a place," have been admitted to prove a tradition in the family that they had relations who lived at that particular place. Evidence has also been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant. The language of the Indian Evidence Act—"When the statement relates to the existence of any relationship between persons, &c.," may be interpreted to mean "relates *directly* or *indirectly*;" and, if this interpretation be adopted, the principle of the above cases will doubtless be followed in India. To extend the admissibility of evidence is part of the scope of the new Act, and no doubt that construction will be favoured which best accords with this scope and intention. The word "*pedigree*" in English law embraces not only general questions of descent and relationship, but also the particular facts of *birth*, *marriage*, and *death*, and the *times* when these events happened. Whether a similar meaning will be given to the word "*relationship*" in the Indian Act, it is premature to discuss. Illustration (*l*),[1] however, seems to indicate that it was not the object of the Legislature to exclude every portion of the statement, except that portion which bears directly upon the subject of actual relationship. The statement in the letter as to the existence of relationship might be wholly complete without any mention of the date of the child's birth.

There is one important restriction on the admissibility of this kind of evidence imposed by English law, but which finds no place in the Indian Evidence Act. The evidence is not admitted in every case in which the birth, marriage, or death of a person forms the subject of controversy, but in those cases only which directly or indirectly involve some question of relationship, and in which the fact sought to be established is required to be proved for some genealogical purpose. Under the Indian Act the statement is admissible, provided it relate to a fact *relevant* to the case. It will in no way affect the admissibility of this evidence, that there are living witnesses who can depose to the same fact: nor is it necessary that the statements should have been contemporaneous with the events to which they relate. On this latter point Lord Brougham

[1] *Ante*, page 145.

remarked that such a restriction would defeat the purpose, for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence.

In connection with the present subject, it may be well to make a few remarks about *family conduct*, which is usually treated as part of the subject by English text-writers. Such conduct has been admitted as evidence, from which the opinion and belief of the family may be reasonably inferred. "If the father," said Sir James Mansfield in the Berkeley Peerage case, "is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." So the concealment of the birth of a child from the husband, the subsequent treatment of such child by the person who, at the time of its conception, was living in adultery with the mother, the fact that the child and its decendants assumed the name of the adulterer, and had never been recognized in the husband's family as his legitimate offspring, were held to be circumstances that went far to rebut the presumption raised by law in favour of the legitimacy of the issue of a married woman. This evidence will be admissible in India under Sections 8, 9, or 11, *ante*, and under Section 50, *post*. For examples of family conduct admitted as evidence, see the cases of *Mutuswamy Jagavera Yettapa Naiken* v. *Venkataswara Yettapa*, 11 B. L. R. P. C. 15: and *Rajendronath Haldar* v. *Jogendronath Banerji*, &c. 14 Moo. In. Ap. 67.

It remains to make a few additional remarks especially on the *sixth* clause. The relationship, with which the statement is here concerned, must be relationship between persons deceased, and must also be contained in a will or deed[1] relating to the affairs of the family to which any such deceased person belonged, or in some family pedigree, or upon some tombstone, family portrait, or other thing on which such statements are usually made. Bibles, prayer-books, missals, almanacs, among Christians; and horoscopes among Hindús, are examples of other things on which such statements are usually made.[2] Entries in a family bible are admissible in England without proof that they were made by a relative. There is nothing in the clause of the Indian Act, now under notice, which requires that the statement in any of the things

[1] The marginal note has "will or deed *of deceased person*." The words in *italics* appear to be a mistake. At any rate, they cannot affect the language of the section itself, marginal notes not being part of a statute, and being therefore incapable of altering the plain meaning of the text (*Claydon* v. *Green*, L. R. 3, C. P. 511).

[2] Whether *letters, correspondence*, &c. will be held to be so far *ejusdem generis* as to be included among "other things" may be doubtful. Their admissibility under Clause v on proof of *special means of knowledge* is clear enough.

therein mentioned should have been made by a relative, or, indeed, which requires it to be shown at all by whom the statement was made. As to a will, see the case of *Nil Mani Chaudhrí* v. *Zahirunissa Khanum and others*, 8 (W. R. 371.) where the incidental mention of a child's age in the recital of a will was held to be no proof of the exact age of such child. The published report of this case does not show whether the child was dead at the time the evidence was offered. If dead, the case is no longer law. With respect to *family pedigrees*, the Indian Act follows the principle laid down, after much discussion, in the case of *Davies* v. *Lowndes*.[1] The pedigree here traced the genealogy of the family from an almost fabulous antiquity down to the immediate contemporary relatives of the writer, and had the following memorandum at foot:—"Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to T. L., this 4th day of July, A.D. 1733, by his loving kinsman W. L." The Exchequer Chamber decided that part, if not all, of this pedigree was admissible as evidence on the ground that a pedigree made or recognized by a member of a family may be presumed to have been so made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew or heard from other members who lived before his time. If, however, the facts rebutted this presumption and showed that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected, or at least so much of it as appeared to have been derived from improper sources.

Inscriptions on tombstones, mural and other funeral inscriptions, &c., may be proved by copies. See Clause (*d*), Section 65, *post*, and the definition of "document," Section 3, *ante*.[2]

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[1] 7 Scott's Reports, 21, S. C.; 5 Bingham's New Cases 167.

[2] The testimony of Hindús as to the history of their family during preceding generations is occasionally more valuable than similar testimony given by persons of other races, certain castes of the Hindús observing it, as a rule, in the education of their children to teach them to repeat and keep in remembrance the names of their ancestors—*Letter from R. Adair, Esq., Collector of Bhaugulpore, to the Board of Revenue, dated 7th September* 1787, see *Amrit Nath Chaudhri* v. *Gauri Nath Chaudhri*, 6 B. L. R. P. C 124. "I must observe," writes Mr. Adair, "that on the many occasions I have had of comparing these accounts given by families whose relationship was very distant and their interests in opposition, they have seldom varied in the steps by which they have followed their lines of descent back to one common stock."

VII. We have in the next place[1] to consider statements contained in any deed, will, or other document, which relates to any such transaction as is mentioned in section thirteen, clause *(a)*, that is, any transaction by which any right or custom was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence. In the note to Section 13 (*ante*, p. 93), I have already remarked that the word "right" must be held to include *private* as well as *public* rights. It was for many years a disputed question in Westminster Hall whether hearsay evidence, or evidence of reputation, could be admitted to prove matters of private right or prescription; and the practice as to admitting or rejecting this kind of evidence varied on different circuits. In the case of *Didsbury* v. *Thomas*,[2] the question was whether a certain testator were, at the time of making his will and of his death, the owner of a certain farm called 'Meadow Farm.' It was alleged, for the plaintiff, that he was the owner, having purchased it of Sir J. S. and permitted his son Richard to occupy it until his (the testator's) death. Several witnesses gave evidence that one G. R. a tenant of Sir J. S. occupied the farm before Richard had it; that Richard took possession of it some sixty-one years before the trial, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time; and that the testator lived some ten years after his son Richard took possession. Another witness deposed that Richard took possession of and occupied Meadow Farm at the same time when his brother Edward occupied another farm called 'Foxlow's Croft,' and that both farms were *reputed* to be the property of Sir J. S., and to have been purchased from him at the same time by the testator. A deed was then proved by which the testator had given to his son Edward the farm called 'Foxlow's Croft,' which said farm, "said the deed," has been lately purchased amongst other lands and hereditaments by the said S. W. (the testator) of and from Sir J. S. &c. Objection was taken at the trial to the evidence of reputation, but the learned Judge was of opinion that, coupled with the deed, the evidence was admissible. He thought that as it was in proof that Sir. J. S. was the landlord of the Meadow Farm when occupied by G. R. before Richard's occupation; and that, as the deed also proved that Sir J. S. was also

Statement in document relating to transaction by which right or custom was created, recognized, &c.

[1] It may be observed that the statements made relevant by Clauses 6 and 7 must be *written*, and that the word "verbal" at the commencement of the section has no application to these clauses.

[2] 14 East's Reports, 323, and see 2 Smith's L. C. 7th Ed. 500.

the owner of Foxlow's Croft, and that the testator had purchased that amongst other lands and hereditaments from him; and, as it was also proved that both the sons took possession of their respective farms at the same time, there was a sufficient basis laid to admit reputation that those other lands and hereditaments referred to in the deed were the Meadow Farm. On a motion for a new trial, it was contended that though reputation alone in a matter of private right was not admissible, yet it was properly received when accompanied by the possession of the land at the time by the party to whom the evidence referred, and coupled as it was with the deed proved, the contents of which were confirmatory of the reputation. It was, however, decided that the evidence had been improperly received.

In the case of *Morewood* v. *Wood*,[1] the question was whether the defendant had a prescriptive right of digging stones on the lord's waste. The plaintiff produced a *presentment* of the free-holders of the Court baron of the manor, of which he (the plaintiff) was lord, which presentment contained the following item :—"If any person gets stone without leave of the lord of the manor, we pain him 10*s*." This particular presentment was proved to have been signed by the defendant's grandfather, under whom he claimed. Other presentments signed by strangers were offered as evidence of reputation; and parol evidence of reputation, that none but the lord had the right to dig stone, was also tendered. This evidence was rejected, and on a motion for a new trial, the Judges were evenly divided (two against two) as to its admissiblity. One of those who held it admissible (Buller, J.) was, however, of opinion that the evidence ought not to be received, except a foundation were first laid by other evidence of the right. Three out of the four Judges thought, however, that such evidence might be given as to a *particular custom*, though not as to a *private* prescriptive right. In *Clothier* v. *Chapman*,[2] evidence of reputation of the boundary between two private estates was rejected. In the case of *Reg.* v. *The Inhabitants of Bedfordshire*,[3] the question was as to who were liable to repair a certain bridge, and parol evidence of reputation was admitted; but here the matter in dispute was one in which the public had some interest, and Lord Campbell in his judgment guardedly said that the relaxation of the general rule ought not to be extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. The balance of authority seems to be in favour of the proposition that

1 14 East's Reports, 327 n : 2 Smith's L. C. 7th Ed.. 504.
2 14 East's Reports, 331 n.
3 14 Jurist, 208; 4 Ellis and Blackburn's Reports 535.

evidence of this kind is not admissible in England upon questions of mere private rights:[1] but it will appear from what has been said that a contrary rule has been adopted in framing the Indian Act.

It will be observed that the clause now under notice does not declare all reputation to be relevant, but that only which consists of statements contained in any deed, will, or other document relating to any transactions by which any right or custom was *created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.* The clause, therefore, does not provide for the admissibility of *parol* evidence of reputation in the cases to which it applies. Of the documents which are admissible under this clause, judgments and decrees are not the least important. Upon this subject, see *ante* p. 94, and the case of *Lalla Ránglal and others* v. *Deo Narain Tiwári*, 6 B. L. R. 69.

Statements by a number of persons, expressing feelings or impressions.

VIII. Statements, written or verbal, made by a number of persons and expressing feelings or impressions on their part relevant to the matter in question, are relevant and may be proved by the testimony of persons other than those who made them, when such persons are dead, or cannot be found, or have become incapable of giving evidence, or when their attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable. Whether it must be shown that *all* the persons who expressed their feelings or impressions are dead or cannot be found, &c. before evidence will be admitted of what any one of them said, is a question which may give rise to some difficulty. One of the leading cases on the subject now under notice was that of *Du Bost* v. *Beresford.*[2] Here the plaintiff painted a picture, which he designated "The Beauty and the Beast," and caused it to be exhibited for money, upon which crowds went to see it. The defendant went and hacked the picture to pieces. The plaintiff sued to recover the full value of the picture as a work of art, and compensation for the loss of the exhibition. The defendant alleged that the picture was a scandalous libel upon his brother and sister; and, in order to show whether the painting was made to represent these persons, the declarations of the spectators while looking at the picture in the exhibition, were admitted in evidence.[3] The question whether the evidence was admissible unless all the spectators were proved to be dead does not seem to have here arisen. Doubtless the difficulty, if not impossibility, of ascertaining the names of all the persons who expressed thir feelings or impres-

[1] See 2 Smith's, L. C. 7th Ed., p. 509.

[2] 2 Campbell's Reports 511.

[3] This case is *Illustration (n).*

sions, and of calling them all as witnesses, will, in the great majority of cases, be held to occasion *an amount of delay or expense, which, under the circumstances of the case, will appear to the Court to be unreasonable.* Another instance of the admission of this kind of evidence was where, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness was allowed to prove that several persons, who were not examined at the trial, had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance.[1] The clause applies when a number of persons assembled together give utterance to a common statement which expresses the feelings or impressions in their minds at the time of making it. It has no application to the case of a police officer, who goes round and collects a great number of statements from persons in different places; nor could he be permitted to give the result of these statements as evidence—*The Queen* v. *Ram Dutt Chaudhri*, 23 W. R. Crim. Rul. 38. Reputation, the declarations of the neighbourhood as to their impression on the subject, have been received in England as evidence of marriage, though not in criminal cases, where stricter proof is required. In the case of the *Queen* v. *Wazira and another* (8 B. L. R., Ap. 63; S. C. 17 W. R. Crim. Rul. 5), it was held that in a prosecution for enticing away a married woman under Section 498 of the Penal Code, evidence that the man and woman were living together was sufficient to raise the presumption that they were man and wife, and to throw upon the prisoner the burden of proving that they were not married. It would, however, appear from the published report of this case that there was other and direct evidence of the marriage.[2] The Indian Evidence Act, it will be observed, applies without distinction to civil and criminal cases.

In connection with the present section should be read Clause 1 of Section 21 (*ante* p. 114). "An *admission* may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section thirty-two." An exception to this rule

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1 See *Reg.* v. *Vincent*, 9 Carrington and Payne's Reports, 275; *Redford* v. *Birley*, 3 Starkie's Nisi Prius Reports 88.

2 As to evidence of marriage see also Section 50 *post*; and Letter No. 1144 from Registrar of High Court dated 15th December 1865, 1 R. C. and C. R. Cir. and Let, 3. A curious discussion on the subject of offence against marriage in Eastern Bengal and the amount of evidence required by the Courts to prove the fact of marriage among Mahomedans will be found at page 479 and following pages of the *Supplement to the "Calcutta Gazette"* of the 26th March, 1873. It is remarkable that none of those who took part in the discussion made any reference to Section 50 of the Evidence Act.

will be found in Section 94 of the Bengal District Road Cess Act X (B. C.) of 1871, which enacts that returns, filed by or on behalf of any person in pursuance of the provisions of that Act, shall be admissible in evidence against him, but *shall not be admissible in his favour*.]

Evidence in a former judicial proceeding when relevant.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

[The general rule, both in civil and criminal proceedings, is that the evidence of the witnesses must be taken *in the presence of* the parties or their pleaders. Witnesses are *examined* by the party who calls them; *cross-examined* by the adverse party; and *re-examined* by the former, if it be so desired (see Section 137, *post*). I shall show presently that there are some exceptions to this rule, and that the evidence of witnesses taken otherwise than in the presence of the parties is admissible under certain circumstances. The present section is scarcely an exception, seeing that the evidence rendered admissible by it must have been given in a proceeding in which the

adverse party was or might have been present, had he so desired. In order to the admissibility of the evidence it must *first* be shown that the witness was examined on oath or solemn affirmation as required by the law for the time being in force. In connection with this point see Section 80, *post*, and consider Section 13 of "The Indian Oaths' Act, 1873." *Secondly*, it must appear that the evidence was taken in a judicial proceeding or before a person authorized by law to take it. This can be generally proved by the production of the original record; and see Clause 7, Section 57; Section 80; and Exception 1, Section 91, *post*. If the Judge or Magistrate, before whom the evidence was given, were acting without jurisdiction, he would not be *authorized by law* to take such evidence. *Thirdly*, it must be shown, that the witness whose deposition it is proposed to give in evidence, is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or that his presence cannot be obtained without an amount of delay and expense, which, under the circumstances of the case, the Court considers unreasonable—(See *The Queen* v. *Lakhan Santhal*, 21 W. R. Crim. Rul. 56: *Bhúban Mayi Dasi, &c.* v. *Ambika Charun Sett, &c.*, 23 W. R. 343: *The Queen* v. *Prosonno Chandra Gosami, &c.*, 22 W. R. Crim. Rul. 36: *The Queen* v. *Lakhi Narain Nagori*, 24 W. R. Crim. Rul. 19.) The burden of proving these facts lies on the person who wishes to give the evidence (see Section 104, *post*). Under English law the evidence is admissible in civil cases when the witness is dead, or out of the jurisdiction of the Court, or not to be found after diligent search, or insane, or permanently sick, or kept out of the way by the contrivance of the opposite party. In criminal proceedings, however, a much stricter rule is applied, and the deposition of a witness taken before a Magistrate or Coroner will not be rendered admissible by mere proof that the witness himself cannot be found after diligent search. The above section of the Indian Evidence Act applies alike to civil and criminal proceedings. Here and elsewhere, when it is proposed to give in evidence the deposition or statement of a person said to be dead, it will be well to bear in mind the provisions of Sections 107 and 108, *post*. So much of the rule as admits the deposition of a witness kept out of the way by the adverse party is founded upon the broad principle of justice, which will not permit a person to take advantage of his own wrong.

Pre-requisites to admissibility.

The first proviso enacts that the previous proceeding in which the evidence was originally given must have been between the same parties or their representatives in interest. As to representatives in

Previous proceeding must have been between same parties or their privies.

interest see note to Section 18, *ante*, p. 111, and *Mrinmayi Debya* v. *Bhuban Mayi Debya*, 15 B. L. R. 5. In this case it was held that the widow of a deceased Hindú, to whom a son had been adopted, did not represent the estate so as to be the *representative in interest*, within the meaning of this section, of a second adopted son whose adoption took place after the death of the first. A person claiming under an execution-sale is equally a *representative in interest*, with a person claiming under an ordinary assignment or conveyance (*Raja Inayat Hosein* v. *Giridhari Lal*, 2 B. L. R., P.C. 78; but see *Srimati Anand Mayi Dasi* v. *Dharandra Chandra Mukhapadhya*, 8 B. L. R. P. C. 127). The rule in the proviso depends upon the principle of reciprocity, it being reasonable that the right to use the evidence should be co-extensive with the liability to be bound thereby. It appears that it will make no difference that the parties are differently arrayed in the two proceedings—the plaintiff in the first proceeding being defendant in the second, or *vice versâ*. The application to criminal proceedings of so much of the rule as admits the evidence against *representatives in interest* may require some consideration.

Adverse party must have had right and opportunity to cross-examine.

The second proviso enacts that the adverse party in the first proceeding must have had the right and opportunity to cross-examine. This will prevent a co-defendant from using in a subsequent proceeding the evidence of a witness produced by another co-defendant. If the adverse party had both the right and the opportunity to cross-examine, it will not affect the admissibility of the evidence that he did not chose to avail himself thereof: but in order to the admissibility of the evidence it must be shown that there were this right and opportunity—*the Queen* v. *Manjan* alias *Nane Khan*, 20 W. R. Crim. Rul. 69. If he had been permitted to cross-examine, where he had not the *right* to do so (see Section 165, *post*), it may be questionable if the evidence would be admissible.

Questions in issue must be substantially the same.

The third proviso enacts that the questions in issue must be substantially the same in the first as in the second proceeding. "If the point in issue," says Mr. Taylor, "though very similar, was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded; and on this ground it has been held (though, perhaps, with questionable propriety) that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding"

(§ 437). Whether a deposition taken in a civil case would be admissible in a criminal case between the same parties or *vice versâ*, the section does not say in so many words, but the effect of the present proviso will be to exclude it in all but a few instances. Whether the questions in issue are substantially the same in the first and second proceedings is a question which will occasionally require careful consideration. It may be an useful test in many cases to see whether the same evidence would or would not prove the affirmative of both.

Sections 249 and 323 of the Code of Criminal Procedure.

In connection with the present subject may be considered Section 249 of the Code of Criminal Procedure (Act X of 1872 as amended by Act XI of 1874) which enacts thus:—"When a witness is produced before the Court of Session or before the High Court in the exercise of its original or appellate criminal jurisdiction, the evidence given by him before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused person—EXPLANATION—This section shall not authorize the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under the Indian Evidence Act, 1872, or other law in force for the time being upon the subject of evidence.—The operation of this section should ordinarily be limited to cases in which a witness at the trial makes statements inconsistent with his deposition before the Magistrate (*The Queen* v. *Majohar Rai*, 24 W. R. Crim. Rul. 11). It gives the Court a discretion to accept the statements made by the witness before the committing Magistrate, notwithstanding that they are denied or that inconsistent statements are made at the trial, if the Court can feel satisfied from the evidence of the same witness or of other witnesses before itself that the original statements were the true ones. This discretion is to be exercised upon substantial and reasonably sufficient materials and not upon mere speculation or conjecture (*The Queen* v. *Amanúla*, 12 B. L. R. Ap. 15; S. C. 21 W. R. Crim. Rul. 49: *Reg.* v. *Arjan Meghá and Máná Jeesá*, 11 Bom. H. C. Rep. 281). In the latter case it was further observed that the exercise of this discretion, considering it as a matter of fact or of law, is open to review in appeal. Before the evidence can be used in this way, it must of course appear that it was duly taken by the committing Magistrate in presence of the accused person (*The Queen* v. *Nasirudin*, &c., 21 W. R. Crim. Rul. 5).

Another instance in which evidence taken by the committing Magistrate may be used at the trial without calling the witness is

that of a Civil Surgeon or other medical witness, whose examination, taken and duly attested by a Magistrate, may be given in evidence, although the deponent is not called as a witness. The Court may however summon and examine such medical witness if it see fit (See Section 323 of the Code of Criminal Procedure, and Section 152 of the Presidency Magistrates' Act, IV of 1877).

I have said above that there are some exceptional cases in which evidence is admitted against an accused person, although it was not taken in his presence, and although he had no opportunity of cross-examining. These cases are, however, few in number, and depend wholly upon necessity. Under Section 325 of the Code of Criminal Procedure any document purporting to be a report from the Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report, in the course of any criminal trial, or in any preliminary inquiry relating thereto, may, if it bears his signature, be used as evidence in any criminal trial. The Court may presume that the signature of any such document is genuine, and that the person signing it held the office which he professed to hold at the time when he signed it. Section 153 of the Presidency Magistrates' Act contains similar provisions, and further empowers the Presidency Magistrate, if he think fit, to summon and examine the Chemical Examiner or Assistant Chemical Examiner as to the subject-matter of his report.

Report of Chemical Examiner.

Under the provisions of Section 327 of the Code of Criminal Procedure and Section 155 of the Presidency Magistrates' Act, if an accused person abscond and after due pursuit cannot be arrested, any Court, competent to try or to commit such accused person for trial for the offence complained of, may, in his absence, record the statements of the persons acquainted with the facts; and such depositions may, on the arrest of such person, be put in on his trial for such offence, if it is not practicable to procure the attendance of such witnesses.

Record of evidence in the absence of the accused.

In connection with the present subject may be considered the provisions of the law for the examination of witnesses by commission. Section 383 of the Civil Procedure Code enacts that any Court may in any suit issue a commission for the examination on interrogatories or otherwise of persons *resident within the local limits of its jurisdiction*, who are exempted under the Code from attending the Court, or who are from sickness or infirmity unable to attend it. This order may be made by the Court either of its own motion,

Examination of absent witnesses by commission in Civil Cases.

or on the application, supported by affidavit, of any party to the suit or of the witness to be examined (s. 384). A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court issuing the commission thinks fit to execute the same (s. 385). Any Court may issue a commission for the examination of (*a*) any person resident beyond the local limits of its jurisdiction; (*b*) persons who are about to leave such limits before the date on which they are required to be examined in Court; and (*c*) civil and military officers of Government who cannot, in the opinion of the Judge, attend the Court without detriment to the public service. Such commission shall ordinarily be issued to any Court not being a High Court, within the local limits of whose jurisdiction such person resides, and which can most conveniently execute the same: but if he resides beyond the local limits of the jurisdiction of the Court issuing the commission and within the towns of Calcutta, Madras, Bombay, or Rangoon, the commission shall be issued to the Court of Small Causes within whose jurisdiction he resides. Under special circumstances, however, the commission may be directed to any person whom the Court issuing the commission thinks fit to appoint (s. 386). When any Court, to which application is made for the issue of a commission for the examination of a person residing at any place not within British India, is satisfied that his evidence is necessary, the Court may issue such commission (s. 387). Every Court receiving a commission for the examination of any person shall examine him pursuant thereto (s. 388). After the commission has been duly executed, it must be returned, together with the evidence taken under it, to the Court out of which it issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto, and the evidence taken under it, shall form part of the record of the suit (s. 389). But evidence taken under a commission cannot be read as evidence in the suit without the consent of the party against whom the same is offered, unless (*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court; or (*b*) the Court in its discretion dispenses with the proof of any of these circumstances and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same (s. 390). These provisions as to the

execution and return of commissions apply to commissions issued by (*a*) Courts situate beyond the limits of British India and established by the authority of Her Majesty or of the Governor-General in Council; or (*b*) Courts situate in any part of the British Empire other than British India, or (*c*) Courts of any foreign country for the time being in alliance with Her Majesty. The fact that a witness could be examined by commission would appear to be no bar to the admissibility of his evidence under Section 33 of the Indian Evidence Act. Although the code does not expressly require notice of the issue of a commission to be given to the other side, yet such notice should always be given, lest the objection be raised that there was an irregularity in proceeding with the commission because an opportunity was not afforded of appearing before the commissioner and cross-examining the witnesses (see *Steinkeller* v. *Newton*, 1 Scott N. R. 148; and *Attorney-general* v. *Davison*, M'Clel. and Y. 160). Section 400 of the Civil Procedure Code must however be considered, which makes it the duty of the Court, when a commission is issued, to direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders; and empowers the commissioner to proceed *ex parte*, if they do not so appear. As to the practice when witnesses are examined under a commission issued by the High Court in its original side, see *Pran Krishna Chandra* v. *Biswanath Chandra and others*, 8 B. L. R. Ap. 101 (Attorney cannot cross-examine —commissioner must be sworn); *Dwarkanath Dutt* v. *Ganga Dayi and others*, 8 B. L. R. Ap. 102 (use by one party of evidence taken under a commission issued at the instance of the other party).

Commission to make local investigations.

Section 392 of the Code of Civil Procedure enacts that in any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court: provided that when the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules. The commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, is to return such evidence together with his report in writing, subscribed with his name, to the Court (Section 393). The report of the commissioner and the

evidence taken by him (but not the evidence without the report —*Debnarain Deb* v. *Kali Das Mitter*, 6 B. L. R. Ap. 70) are to be evidence in the suit and to form part of the record; but the Court, or any of the parties to the suit, may, with the permission of the Court, examine the commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to the manner in which he has made the investigation (s. 393).[1] As to commissions to examine accounts, see note to Section 34, *post*.

The examination of witnesses by commission in criminal proceedings is provided for by Section 330 of the Code of Criminal Procedure, Act X of 1872 as amended by Act XI of 1874, which enacts as follows:—"Whenever it appears that the attend-"ance of a witness cannot be procured without an amount of delay,

When a Commission may issue in Criminal Cases.

"expense, or inconvenience, which, under "the circumstances of the case, would be "unreasonable, it shall be competent to a "Court of Session or to a High Court to dispense with the personal "attendance of such witness. Such Court of Session or High Court

Mode of issuing Commission.

"may direct a commission to the Magistrate "of the District, or to a Magistrate of the "first class, in whose jurisdiction such wit-"ness may be. The Magistrate to whom the commission is direct-"ed shall proceed to the place where such witness is, or shall sum-"mon such witness before himself. Such Magistrate shall take the "evidence of such witness in the same manner, and shall have for "this purpose and may exercise, the same powers, as in trials of war-"rant cases. If the witness is within the local limits of the ordi-"nary original criminal jurisdiction of any of the High Courts of "Judicature at Fort William, Madras, and Bombay, the Court dis-"pensing with his personal attendance may direct a commission to "any Police Magistrate within such limits, and such Police Magis-"trate shall have the like power to compel the attendance and exa-"mination of witnesses as he possesses for that purpose in cases

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[1] In the Bengal Presidency, Amíns, or Native commissioners, employed under the provisions of Act XII of 1856, are usually at present deputed to make local investigations under the above provisions. The proper functions of an Amín appointed to make a local investigation will be found discussed in the following cases:—*Ishwar Chandra Das* v. *Jagal Kishor Chakravartti*, 4 B. L. R. Ap. 33; *Sarat Chandra Rai Kanungo* v. *The Collector of Chittagong*, 2 B. L. R. Ap. 3; *Gobind Chandra* v. *Rabutti Mani Chaudrain*, 2 Sevestre's Rep., 210; *Ram Charan Mahtún and others* v. *Sarabjit Mahtún and others*, 9 W. R. 494; *Ambika Charn De and others* v. *Goluk Chandra Chakravartti*, 9 W. R. 596; *Bheirab Rai and another* v. *Nobin Rai and others*, 11 W. R. 601; *Goluk Chandra Kúl* v. *Dúkhi Ram*, 12 W. R. 39.

"pending before him. The prosecutor and the accused person may "forward interrogatories upon which the "officer to whom the commission is directed "shall examine the witness, or the prosecu-"tor may appear personally before the Magistrate or Police Magis-"trate to whom the commission is directed, or the prosecutor or "accused person may so appear by authorized agent.

Prosecutor and accused may examine witness.

"Whenever, in the course of a trial before a Magistrate, it shall "appear that a commission ought to be "issued for the examination of a witness "whose evidence is necessary in such trial, "such Magistrate shall apply to the Court "of Session to which he is subordinate, stating the reasons for the "application; and such Court may either issue a commission in the "manner hereinbefore provided, or may reject the application.

Procedure when commission is required in Magistrates' cases.

"After any commission issued under this section has been duly "executed, it shall be returned, together with the deposition of the "witness examined thereunder, to the Court out of which it issued; "and the commission, the return thereto, and the deposition of such "witness, may be used as evidence in the case and shall form part "of the record."[1]

Under the provisions of Section 111 of Act I of 1859 (*An Act for the amendment of the Law relating to Merchant Seamen,*) depositions made *in relation to the same subject-matter*, before any Justice or Magistrate in Her Majesty's dominions (including all parts of India other than those subject to the same Local Government as the port or place where such proceedings are instituted), or any British Consular Officer *elsewhere*, are, if authenticated by the signature of the Justice, Magistrate, or Consular Officer, declared to be admissible in evidence on due proof that such witness cannot be found within the jurisdiction of the Court: provided that, if the proceeding be criminal, such deposition shall not be admissible unless it was made in the presence of the person accused, and the fact that it was so made is certified by the Justice, Magistrate, or Consular Officer; of whose signature or official character, however, no proof is to be required.

Cases connected with Merchant Seamen, &c. Section 111, Act I of 1859.

In inquiries and trials under the *Foreign Jurisdiction and Extradition Act, XI of* 1872, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before

Sections 10 and 14, Act XI of 1872.

[1] Similar provisions are contained in Sections 157, 158 of the Presidency Magistrates' Act, IV of 1877.

the Political Agent or a Judicial Officer in the State in which such offence is alleged to have been committed, shall be received as evidence by the Court holding such inquiry or trial, in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate (see Sections 10 and 14 of Act XI of 1872.)

33 & 34 Vict. Cap. 52, Sections 14, 15, and 24.

In proceedings under *The Extradition Act*, 1870, 33 & 34 Vict., Cap. 52, depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements may, if duly authenticated, be received in evidence: and they shall be deemed to be duly authenticated, if authenticated in manner provided for the time being by law, or certified under the hand of a Judge, Magistrate, or officer of the Foreign State, where the same were taken, to be the original depositions or statements or to be true copies thereof, as the case may require, and if authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of State. And all Courts of Justice, Justices, and Magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

13 Geo. 3, Cap. 63, Sections 39, 49, 41, 42, 44, 45.

Under the provisions of the 13 Geo. 3, Cap. 63, any Governor-General, President, Governor, Chief Justice, Judge, or other person in the Civil or Military Service in India, may be tried before the Court of Queen's Bench for any offence committed in India;[1] and the Court of Queen's Bench may award a writ of *mandamus* requiring the Chief Justice and Judges of the Supreme (High) Court in India to hold a court for the examination of witnesses and receiving other proofs concerning the matters charged. The examination of witnesses is to be taken *vivâ voce* in open court, and is to be reduced to writing, and shall be sent to the Court of Queen's Bench, closed up and under the seals of two or more of the Judges. The agent of the party may take delivery of the packet, and shall deliver the same to one of the clerks of the Court of Queen's Bench, and make oath that he received the same from the hands of one or more of the Judges in India, and that the same has not been altered or opened since he received it. Depositions so taken and returned shall be allowed and read, and shall be deemed as good and competent evidence as if the witnesses had been present and sworn and examined *vivâ voce* at a trial in the Court of Queen's Bench, any law or usage to the contrary notwith-

[1] See also 10 Geo. 3, Cap. 47, Sec. 4; 26 Geo. 3, Cap. 57, Sec. 25; and 42 Geo. 3, Cap. 85.

standing (Section 40). If the charge be against the Chief Justice or any of the Judges, the *mandamus* will go to the Governor-General in Council (Section 41). Under the 42nd Section, in all cases of proceedings in Parliament touching offences committed in India, it shall be lawful for the Lord High Chancellor or Speaker of the House of Lords, and also for the Speaker of the House of Commons, to issue his warrant for the examination of witnesses in the manner just described; and the depositions so taken and returned shall be good and competent evidence, and shall be allowed and read in the House. Such depositions are not, however, to be allowed to be given in evidence in any capital cases other than such as shall be proceeded against in Parliament (Section 45). Under the 44th Section similar writs of *mandamus* may be awarded by the Courts at Westminster in suits both in law and equity, the cause of action in which has arisen in India.

These provisions are, by the 21 Geo. 3, Cap. 70, Sec. 5, extended to the case of any person making a complaint to the Supreme (High) Court against the Governor-General of any oppression or injury, and entering into a bond to prosecute the same within two years in some competent Court in Great Britain.

21 Geo. 3, Cap. 70, Sections 5 and 6.

Similar provisions are contained in the 24 Geo. 3, Cap 25, which provides for the trial before Special Commissioners of British subjects holding offices or employments in India and charged with extortion or other misdemeanour committed in the East Indies.

24 Geo. 3, Cap. 25, Section 78.

Under the 42nd Geo. 3, Cap. 85, which provides for the trying and punishing in Great Britain persons holding public employment for offences committed abroad, the Court of Queen's Bench is empowered to award similar writs of *mandamus* for the taking of evidence, and the return of the same to any Chief Justice and Judges, or any Chief Justice or other Judge singly for the time being, of any Court or Courts of Judicature in the country or near to the place where the crime, offence, or misdemeanour shall be charged in the indictment or information to have been committed, or to any Governor or Lieutenant-Governor or other person having any chief authority in such country or to any other person or persons residing there.

42 Geo. 3, Cap 85, Section 2.

The 1st Geo. 4, Cap. 101, provides for the issue of his warrant by the Speaker of either House of Parliament to the Judges of the Supreme (High) Courts for the examination of witnesses in

1 Geo. 4, Cap. 101,

India in cases of bills of divorce; and declares, to be competent and admissible evidence; in such cases the examination of witnesses taken and returned under the provisions of the Statute. As to divorce cases see also *post*, p. 190.

6 & 7 Vict. Cap. 98.

The 6th & 7th Vict. Cap. 98, passed for the more effectual suppression of the slave trade, extends the above provisions of the 13th Geo. 3, Cap. 63, to all cases of indictment or information laid or exhibited in the Court of Queen's Bench for misdemeanours or offences committed against the Acts for the abolition of the slave trade, in any places out of the United Kingdom and within any British colony, settlement, plantation, or territory.

14 & 15 Vict. Cap. 81, Section 6.

The 14th & 15th Vict. Cap. 81, which empowers the Supreme (High) Courts at the Presidencies to direct the removal from India of lunatics and idiots when a guardian, keeper, or curator of any such lunatic or idiot has been appointed, declares it lawful for the proper officer of the Court to transmit a transcript, under the hand and seal of the Chief Justice or Senior Judge, of the *proceedings* by which the idiotcy, lunacy, or unsoundness of mind shall have been found, and by which such guardian, keeper, or curator shall have been appointed, to the Chancery in England and the Court of Session in Scotland and Chancery of Ireland respectively, as the case may require, and such transcript, when so received, shall be entered as record in the Court to which it may have been transmitted; and the record of any such proceedings shall, so far as the Lord Chancellor or Court of Session shall see fit, have the same force and effect, as if such proceedings had taken place in England, Scotland or Ireland, respectively.

18 & 19 Vict. Cap. 104, Section 15.

Under the provisions of the *Chinese Passengers Act*, 1855, any document purporting to be the written declaration of any British Consul or of the Commander of any of Her Majesty's ships of war, or to be a copy of the proceedings of any Court of Justice, shall, without any proof of signature, be received in evidence in legal proceedings taken under the Act or in respect of the bond therein required, if it appear that such copy or declaration, if produced in the United Kingdom, was officially transmitted to one of Her Majesty's Principal Secretaries of State, or, if produced in any colony, was officially transmitted to the Governor thereof.

19 & 20 Vict. Cap. 113.

The 19th and 20th Vict. Cap. 113, entitled *an Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals*, enacts that,

where, upon an application for this purpose, it is made to appear to any Court or Judge, having authority under this Act, that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and power is given to enforce their attendance as also the production of writings or other documents. A certificate under the hand of the Ambassador, Minister, or other diplomatic agent of any Foreign Power, or in case there be no such diplomatic agent, then of the Consul-General or Consul of any such Foreign Power at London, that any matter in relation to which an application is made under the Act is a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic Agent or Consul, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified; but, where no such certificate is produced, other evidence to that effect shall be admissible. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin, and the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such colony or possession, who by any order of Her Majesty in Council may be appointed for this purpose, are declared, respectively, to be Courts and Judges having authority under the Act. By the 24th Section of the *Extradition Act*, 1870, 33 & 34 Vict. Cap. 52, the testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in a Foreign State in like matter as it may be obtained in relation to any civil matter under the statute above first referred to: provided, however, that this provision shall not apply to any criminal matter of a political character.

33 & 34 Vict. Cap. 52, Section 24.

The 22nd Vict. Cap. 20, entitled *an Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals*, enacts that, where, upon an application for this purpose it is made to appear to any Court or Judge having authority under this Act that any Court or tribunal of competent jurisdiction in Her

22 Vict. Cap. 20.

Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such Court or tribunal, of any witness or witnesses out of the jurisdiction of such Court or tribunal and within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order or other process as aforesaid, of such witness or witnesses accordingly: and power is given to enforce the attendance of witnesses as also the production of documents. This Statute contains other provisions similar to those of the 19th and 20th Vict. Cap. 113, and the same Courts and Judges are declared to have authority under both enactments.

6 & 7 Vict. Cap. 94, Section 3.

The preamble to the 6 & 7 Vict. Cap. 94, recites that, whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within diverse countries and places out of Her Majesty's dominions; and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, it is expedient that such doubts be removed: and it then proceeds to enact that the power acquired by Her Majesty in countries out of her dominions shall be held on the same terms as Her Majesty's authority in the crown colonies; and that acts done in pursuance of such power shall be of the same effect as if done under local laws. Section 3 then provides, that if in any suit or other proceeding, whether civil or criminal, in any Court, ecclesiastical or temporal, within Her Majesty's dominions, any issue or question of law or of fact shall arise, for the due determination whereof it shall, in the opinion of the Judge or Judges of such Court, be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the extent thereof, it shall be lawful for the Judge or Judges of any such Court to transmit under his or their hand and seal or hands and seals, to one of Her Majesty's Principal Secretaries of State, questions by him or them properly framed respecting such of the matters aforesaid as it may be necessary to ascertain in order to the due determination of any such issue or question as aforesaid; and such Secretary of State is empowered and required within a reasonable time to cause proper and sufficient answers to be returned to all such questions; and to be directed to the said Judge or Judges or their successors; and such answers shall on production thereof be final and conclusive evidence in

such suit or other proceedings of the several matters therein contained and required to be ascertained thereby. Section 4 empowers any person having authority from Her Majesty in that behalf by warrant under his hand and seal to cause any person charged with the commission of any crime or offence cognizable by any Judge, Magistrate, or other officer within any such country or place as aforesaid (*i. e.* out of Her Majesty's dominions), to be sent for trial to any *British Colony* (this includes British India; see 28 & 29 Vict. Cap. 116) which Her Majesty may by an order in Council from time to time appoint: *provided* that before any such person shall be so sent for trial it shall be lawful for him to tender for examination to the Judge, Magistrate, or other officer having cognizance, *any competent witness or witnesses, the evidence of whom he may deem material for his defence, and whom he may allege himself to be unable to produce at his trial* in the said colony; and the said Judge, Magistrate, &c. shall examine the witness or witnesses and reduce the examination to writing, and shall transmit a copy thereof to the Supreme Court before which the trial is to take place, together with a certificate under his hand and seal of the correctness of such copy; and the Supreme Court is required to allow so much of the evidence so taken as would be admissible according to the law and practice of the Court, had the witness or witnesses been produced and examined at the trial before it, to be read and received as legal evidence at such trial.

6 & 7 Vict. Cap. 94, Section 4.

The 20th and 21st Vict. Cap. 85, Section 47, confers upon the Court for Divorce and Matrimonial Causes created thereby all the powers given to the Courts of Law at Westminster by the provisions of the 13th Geo. 3, Cap. 63, for enabling them to issue commissions and give orders for the examination of witnesses, and by all the provisions of any other Acts for enforcing the attendance of witnesses, or otherwise applicable to the examination of such witnesses.]

20 & 21 Vict. Cap. 85, Section 47.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Entries in books of account when relevant.

Illustration.

A sues B for Rs. 1,000, and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

[As a general rule, books of account were inadmissible in evidence in English Courts of Common Law, except in the particular cases of entries *against interest* or made in the *course of business* by persons dead and incapable of being called as witnesses. A different rule prevails in other countries; and even in England a tradesman's shop-book was in old times admissible as evidence on his behalf. In America, entries made by the party himself in his own shop-books are admissible if made contemporaneously with the facts to which they refer, and forming part of the *res gestæ*. Under Roman law, the production of a merchant's or tradesman's account-books, regularly and fairly kept in the usual manner, was deemed to afford presumptive evidence of the justice of the claim. A similar principle has been followed in the laws of France and Scotland; and Mr. Taylor strongly recommended its adoption in English Courts of Common Law. It has been long admitted and acted upon in Courts of Equity. The Chancery Practice Amendment Act (15 & 16 Vict. Cap. 86, § 54) empowers such Courts " in cases where they shall think fit so to do, to direct that, in taking accounts, the books of accounts, in which the accounts required to be taken had been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

Section 43 of the old Act, II of 1855, was as follows:—"Books *proved* to have been regularly kept in the course of business shall be admissible as *corroborative*, but not as independent, proof of the facts stated therein." The above section of the Indian Evidence Act substitutes "regularly kept" for "proved to have been regularly kept." This, taken with the language of the illustration, "shows" (not "proves") "entries" may appear to indicate it as the intention of the Legislature that the principle of the section just quoted from the 15 & 16 Vict. Cap. 86, is to be followed. So much of the rule, as declares that entries in books of account shall not alone be sufficient to charge any person with liability, follows the Roman law under which such entries were deemed *semiplena probatio*, the suppletory oath of the party being admitted to make up the *plena*

probatio (full proof) necessary to obtain a decree. For the practical application of this rule in India, see the following cases:—*Rai Srí Kishen* v. *Rai Harí Kishen*, 5 Moo. Ind. Ap. 432; *Seth Lakhmí Chand and others* v. *Seth Indra Mull and others*, 4 B. L. R., P. C. 31; *Dwarka Dass and others* v. *Dwarka Das*, 3 N.-W.-P. Rep. 308; *Allyat Chinaman* v. *Jagat Chandra Rai and another*, 5 W. R. 242; *Gopal Mandal and others* v. *Nobo Kishen Múkhapadhya*, 5 W. R. Act X Rulings 83; *Sarabjí Vacha Ganda* v. *Kunwarjí Manikjí*, 1 Moo. Ind. Ap. 47. In this last case their Lordships of the Privy Council said:—"No evidence was brought before the Provincial Court or the Court of Sádr Diwaní Adálat, which was not before the Zillah Court; so that the decree can only be supported by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable." In *Babú Ganga Persad*, &c. v. *Babú Indrajit Singh*, &c. (23 W. R. 391) they observed to the same effect:—"The evidence, which the Subordinate Judge seems to have considered sufficient to prove the payments which the defendants were bound to prove, consisted of the mercantile books of the banking firm and of a general statement by the defendant that the items in those books were correct. Their Lordships are of opinion that, the books being (as is admitted) at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence." The above cases were decided under the old law, between the language of which and of the present section there is some difference. Under the former, books were admissible as *corroborative*, but not as independent, proof of the facts stated therein: under the latter, entries in books of account are *not alone sufficient* evidence to charge any person with liability, *i. e.* unless corroborated by other evidence (see *Balaet Khan* v. *Ras Behari Mukherji*, &c. 22 W. R. 549: *The Queen* v. *Hardip Sahai*, 23 R. W. Crim. Rul. 27). Account-books are *admissible* under this section even though the entries in them were not made by, or at the dictation of, a person who had a personal knowledge of the truth of the facts stated. This a matter, however, which may effect the *value* of the accounts as evidence—*Reg.* v. *Hanmantá*, I. L. R., 1 Bom. 611.

Jamá-Wasíl-Bakí papers.

It may be useful to mention some of the books of account which are produced before the Courts in India, and which have formed the subject of

judicial decision. In cases between landlord and tenant, and in suits for *wasilát* or *mesne* profits, *jamá-wásil-báki* [1] accounts are usually offered in evidence. The decisions are not, however, altogether uniform as to the value which ought to be assigned to these papers. In the case of *Allyat Chinaman* v. *Jagat Chandra Rai and another* (5 W. R. Civ. Rul. 242), the Calcutta High Court (Phear and Glover, J. J), remarked as follows :—" But it is contended that their allegations are corroborated by the *jamá-wásil-báki* papers filed by the respondent, in which the names of these raiyats are entered. Now, we observe that such a document, a private memorandum made for the zemindar's own use and by his own servants, must be looked upon with great suspicion, for nothing could be easier in a case like the present than to supplement defective oral evidence by the production of a document which could be manufactured at any time and to any required pattern. *Has then this document been attested?* We think not. Doubtless a person calling himself a Karkún's Muharrir has been produced to depose to Issur Chandra the Tehsildar's signature to this particular paper, but the Tehsildar himself has not been examined, and it is not pretended that the man is either dead or unable to depose. The best evidence was required to prove a document so naturally open to suspicion and that evidence has not been given." In the case of *Khira Mani Dasya and others* v. *Bejai Gobind Baral and others* (7 W. R. Civ. Rul. 533), Norman, J. referring to this case, said :—" As to the value of *jamá-wásil-báki* papers as evidence in rent suits for the zemindar, the Deputy Collector quotes a passage from the 5th volume of the Weekly Reporter, page 243, and treats it as if the language applied to all *jamá-wásil-bákis*. But there is a wide distinction between the case, with which the learned Judges were then dealing and to which they apply their remarks, and the present. Here we have a series of *jamá-wásil-bákis* apparently regularly kept for ten years, with one gap, from 1249 to 1258. There is a single paper unattested, the writer of which was not called and his absence not accounted for. Of course, all books of account and entries made by or on behalf of a party when produced as evidence in his favour must be received with caution; but there seems to be no reason why a series of collective accounts, or *jamá-wásil-báki* papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business."

[1] A description of this account and of the system of which it forms a portion will be found in the *Appendix*.

In the case of *Gopal Mandal and others* v. *Nabo Kissen Múkhapadhya* (5 W. R., Act X, Rulings, p. 83), Seton-Karr, J. (Macpherson, J. concurring) said:—"The Judge (of the Lower Court) alludes to the evidence of the gomashtahs who filed or attested certain papers of the zemindar. Such papers, we need hardly observe, cannot *incontestibly* prove variations in a raiyat's jamá *unless it can be shown not merely that the jamá-wásil-báki and similar papers show a varying rate, but that the raiyat has paid at a varying rate.*[1] Otherwise every raiyat would be at the mercy of a zemindar or his agents. The Judge says that the witnesses attest these papers, but he does not say how he considers the raiyats bound by them."—(but see *Sib Persád Dhobí* v. *Promothonath Ghose and others*, 10 W. R. 193). In the case of *Ram Lal Chakravarttí and another* v. *Tara Sundari Barmanya* (8 W. R. Civ. Rul. 280) the same Judge said:—"*Jamá-wásil-báki* papers ought not to be regarded as any thing else than 'books proved to have been regularly kept in the course of business,' and these books, by Section 43 of Act II of 1855, are 'admissible as *corroborative* but not as *independent* proof of the facts stated therein.' But in this case there is no independent proof adduced by the plaintiff of that which it was incumbent on him to prove in order to rebut the presumption found in favour of the defendant, and the *jamá-wásil-báki* papers consequently corroborate nothing, nor was the Judge legally justified in drawing from them the conclusions which he did draw." See, to the same effect, *Sheik Newazi and others* v. *Lloyd*, 8 W. R. Civ. Rul. 464; *Bijai Gobind Burral and others* v. *Bhiki Rai*, 10. W. R. 291: and *Pandit Bhagwan Dutt Jha, &c.* v. *Sheo Mangal Singh*, 22 W. R. 256. In *Sheo Shahi Rai and others* v. *Gudar Rai and others* (8 W. R. Civ. Rul. 328), L. S. Jackson, J. said:—"It may be observed that *jamá-wásil-báki* papers in a case of this kind" (suit for possession on the allegation of wrongful dispossession) "are really of very little consequence or value, as it is a matter of perfect ease for either party in the suit to produce any number of such papers. It is even doubtful whether, under the terms of Section 43, Act II of 1855, *jamá-wásil-báki* papers would be admissible even as corroborative evidence strictly speaking; certainly they are not independent evidence of any kind whatever, and therefore the absence of particular papers of that kind does not appear to be a very material

[1] The fact of the rate, at which rent was paid, having varied was the fact sought to be proved by these papers in order to rebut the presumption in favour of a permanent tenure created by Section 4, Act X of 1859. See also Sections 4 and 17, Act VIII (B. C.) of 1869. In *Belaet Khan, &c.* v. *Ras Behari Mukerji, &c.* (22 W. R. 549) decided under the Evidence Act, *jamá-wásil-báki* papers were held sufficient to rebut the presumption arising from twenty years' payment of rent at an uniform rate: but there was other evidence.

omission." See also as to *jamá-wásil-báki* papers, *Gholám Muhammad Shah* v. *Banjurí Cheragí*, 7th August, 1847, S. D. A. Decis. Beng. 403. *Jai-baki* papers brought from the plaintiff's own possession cannot be used against a defendant without showing that he has in some way agreed to them (*Beidonath Parúya* v. *Rassik Lal Mittra*, 9 W. R. 274.)

Jamá-bandí papers.

"*Jamá-bandí*[1] papers may be only used as corroborative evidence, *viz.* of the same value as that which is attached to books of account under Section 43, Act II of 1855. These papers were admittedly prepared by the zemindar's own agent in the absence of the raiyats; and if the mere fact of the agent coming forward to swear that he wrote the papers is to justify a Court in accepting every fact recited therein as true against the raiyats, no raiyat in this country would be safe" (*Gajjo Koer and others* v. *Syud Alay Ahmed*, 6 B. L. R., Ap. 62,—to the same effect, *Chamarni Bibi* v. *Ayanúla Sirdar and others*, 9 W. R. 451, and *Naolas Kunwar* v. *Múnshí Shiva Sahai*, 1 N.-W.-P. Rep. Rev. Ap. 65.)

In *Pandit Bhagwan Dutt Jha*, &c., v. *Sheo Mangal Singh*, (22 W. R. 256) certain *jamá-bandí* papers prepared by a former *patwari* were produced in order to show the rent paid by the defendant during previous years. "Had the former *patwari*," said Phear, J. "come forward as a witness and sworn that he had collected rent from the defendant at the rate shown in the *jamá-bandí*, and that the *jamá-bandí* was his own record of the fact, then this would have afforded very material evidence in support of the plaintiff's claim. But this man is not called and his *jamá-bandí* papers without him are valueless." *Jamá-bandí* papers for the year in respect of which the rent is claimed are no evidence of the landlord's right to the rent shown in these papers (*Dhanúkdharí Shahí* v. *G. Toomey*, 20 W. R. 143: *Kissore Dass*, &c. v. *Tarsan Mahtún*, &c. 20 W. R. 171). Where the *raiyats* signed a *jamá-bandí*, they were held to be bound by it, their signature thereto being regarded as an admission of the correctness of its contents (*R. Watson & Co.* v. *Mahendro Nath Pal*, 23 W. R. 436): and where increased rents were entered in the *jamá-bandí* and it was not shown that the *raiyats* had recorded their assent thereto, they were held not to be bound by it (*Riyazudin Mahomed*, &c. v. *R. McAlpine*, 22 W. R. 540).

Ism-Navísí papers prepared in the ordinary course of business under the provisions of Bengal Regulations XVII, X, and XII of 1807, are admissible in evidence, and may be entitled to some weight. They ought probably to be regarded as corroborative but

[1] For a description of the contents of this account see *Appendix*.

not as independent evidence (*Fergusson* v. *The Government and another*, 5 R. C. and C. R. Civ. Rul. 179; S. C. 9 W. R. 150 *Farquharson* v. *Dwarkanath Singh and the Government of India*: 8 B. L. R. 504; S. C. 14 Moo. In. Ap. 259:—see also *Erskine* v. *The Government and others*, 8 W. R. Civ. Rul. 232). Settlement *beheri* and *awargha* papers are corroborative evidence and nothing more (*Banwari Lal* v. *Forlong*, 9 W. R. 239). As to *hastabúd* papers, see *Ram Narsingh Mittra* v. *Tripúra Sundari Dasya and others*, 9 W. R. 105. As to *Kanungo* papers, see *Khiro Mani Dasya and others* v. *Bijai Gobind Baral and others*, 7 W. R. Civ. Rul. 533, and *Nand Danpat* v. *Tara Chand Prithi-bari*, 2 W. R., Act X, Rul. 13. As to a *hath-chittá* book being *primâ facie* binding upon the vendor, for whose security it is kept, see *Gopi Mohun Rai* v. *Abdúl Rájá Sarjan Nakoda*, 1 Jur. N. S. 358.[1]

It has been a common practice in India to file in court large account-books, when one or two entries only are needed for purposes of evidence; and the subordinate Courts have been in the habit of receiving these books in original, and sending them up to the Appellate Courts to the serious inconvenience of the Courts themselves and occasionally of the parties. In some cases, in which native banking firms or large *zemindars* were concerned, great numbers of account and other books were so admitted; and, when an appeal was preferred to the Privy Council, it became necessary to translate and print the whole of the contents of these voluminous books at an enormous expense to the parties concerned. The evil at length attained such a height that it called forth observations from their Lordships of the Privy Council, upon which the Calcutta High

[1] The following cases may also be consulted in connection with the use of account-books in evidence in India, *viz. Har Gobind Kadwasa* v. *Mohidin Kuli Khan*, 23rd November, 1843, Bellasis' Rep. 48 (Proof of debt by account-books): *Sardha Narain Rai* v. *Sohan Lal and another*, 8th Feb. 1847, S. D. A. Decis. Beng. 45 (Accounts not at first produced and not supported by vouchers): *Ramgopal Mukapadhya* v. *Rodgers and others*, 20th March, 1847, S. D. A. Decis. Beng. 83: *Birjomohan Chaudhri* v. *Chandra Mani Saha and others*, 6th Jan. 1848, 7, S. D. A. Rep. 423 (Mercantile accounts received for what they were worth, though neither signed nor attested):—to the same effect *Joalah Persad* v. *Muhammad Sádat Ali and others*, 1st May, 1848, 3, Decis. N.-W-P. 130: *Ram Sahai Bhaggat and others* v. *Aodan Bhaggat*, 16th February, 1848, S. D. A. Decis. Beng. 83 (*Khatas* must be verified): *Tulsiram and another* v. *Rájá Khusal Singh and another*, 24th Dec. 1848, 4, Decis. N.-W.-P. 337: *Ishan Chandra Singh* v. *Haran Sirdar and others*, 3 B. L. R. 135 (A Judge is bound to look at the whole of the entries, those on the credit and those on the debit side, to give credit to such of them as he believes to be true and to discredit those, if any, which he believes to be false): *Shah Gholam Nasaf* v. *Mussamat Emanam and others*, 9 W. R. Civ. Rul. 275; (Income-tax papers held admissible against, but not in favour of the person whom they concerned): *Rani Durga Sundari* v. *Brindaban Chandra Sirkar Chaudhri and another*, 2 B. L. R. Ap. 37 (Lowazima papers): *Dwarka Dass* v. *Babú Janki Dass*, 6 Moo. In. Ap. 88.

Court issued a Circular Order [1] with a view to rectify the practice of the Courts in this respect. Section 62 of the Code of Civil Procedure now enacts that, if the document on which the plaintiff sues be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with *a copy of the entry on which he relies.* The Court, or such officer as it appoints in this behalf shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original and attesting the copy if found correct, *shall return the book to the plaintiff and cause the copy to be filed.* The book itself should of course be in Court at the trial in case it should be necessary to prove the hand-writing of, or refer to the original entry. Section 141 further provides generally that, if the document proved or admitted in favour of any party be an entry in a shop-book or other book, the party on whose behalf such book is produced may furnish a copy of the entry which may be endorsed by the Judge with a statement that it was proved against or admitted by the person against whom it is used, and shall be filed as part of the record; and the Court shall mark the entry and shall then return the book to the person producing it.

Account-books how to be produced in evidence.

I may observe that Mufassal practitioners too often show an inaptitude to deal with this particular kind of evidence; and (according to my experience) the valuable matter, which is occasionally to be found in books of account, is not utilized to the extent that it might be. They constantly produce in Court a vast mass of account-books, but do not point out the particular entries upon which they rely, to search for which I apprehend that industry is sometimes wanting. Where particular entries are believed to be relevant, it is the duty of those who rely upon them to point them out to the Court. A Judge has not time to search voluminous accounts in order to discover if they contain anything relevant to the case before him; nor indeed is it his duty to perform a work of preparation, which properly appertains to the parties concerned in the case. When it is intended to use in evidence something more than particular entries, the provisions of clause (*g*) of Section 65 of the Evidence Act, and of Sections 394 and 395 of the Code of Civil Procedure should be utilized. The former allows secondary evidence to be given of the

Evidence of Account-books how to be brought before the Court.

[1] No. 9 of the 26th February, 1867, p. 189, Vol. I of the Author's "General Rules and Circular Orders."

existence, condition or contents of original documents when they consist of numerous accounts or other documents, which cannot conveniently be examined in Court, and when the fact to be proved is the general result of the whole collection. Evidence may be given as to this general result by any person who has examined them and who is skilled in the examination of such documents. Section 394 of the Civil Procedure Code enacts that in any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit, directing him to make such examination or adjustment. The Court shall furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination. The proceedings of the Commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite (s. 395).]

Commission to investigate and adjust accounts.

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

Entry in public record, made in performance of duty enjoined by law, when relevant.

[Mr. Taylor, speaking of *official registers* or books kept by persons in public offices, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation, observes as follows, quoting from Starkie:—"These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by the law to be kept, partly because their contents are of public interest and notoriety, but principally because

§35: Where L. C. refused to admit in evidence such entries the decree was reversed. Basappa v. Phakirappa P.J 75 p 12.

they are made under sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnessess." (§ 1429). "To render any document admissible in evidence as an *official register*, it must be one which *the law requires to be kept for the public benefit*." (§ 1430). Lord Denman rejected the Register of Shipping kept at Lloyd's as not falling within this rule; but this register has been admitted in other cases.

The following registers have been rejected:—A certificate filed at the Custom-House which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage; registers of the baptisms and marriages performed at the Fleet and King's Bench prisons at May Fair and at the Mint in Southwark; a Jewish Register of Circumcisions kept at the great synagogue in London, &c. The registers of burials and baptisms formerly maintained by the English clergy, and in their absence by laymen at the stations in India, may, perhaps, be admissible, though they were not prescribed by any law, and the maintenance of them was scarcely an official act.[1] Where these registers are prescribed by local Municipal Acts, there can be no question of their being admissible. *Foreign* and *colonial registers* are receivable in England on proof that they are required to be kept, either by the law of the country to which they belong or by the law of England.

The above section of the Indian Evidence Act follows and somewhat extends the English law on the same subject. The book, register, or record must be either a *public* or an *official* one. The Act does not contain any definition of these terms, but in putting an interpretation on them reference may be made to Section 74, *post*. Again, the entry must have been made by a *public servant in the discharge of his official duty*, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept. The Act contains no definition of the term "*public servant*," but see, as aids to construction, the definition given in Section 21 of the Indian Penal Code, Act XLV of 1860, and Section 2 of the Railway Servants' Act, XXXI of 1867. It is not necessary to the admissibility of an entry made by a public servant in the discharge of his official duty, that the register, &c. should be prescribed by law. The Codes of Civil and Criminal Procedure, the Revenue Laws and other enactments empower the

[1] See, as to the books of baptisms, marriages and burials in India deposited at the office of the Secretary of State, *Ratcliff* v. *Ratcliff and Anderson*, 1 Swabey and Tristram's Reports, 467, and the Report of 1838 of the Commissioners for an Inquiry into the state of Non-parochial Registers, p. 13.

High Courts, Boards of Revenue, and other controlling authorities to prescribe forms for registers, returns, &c. It may be said that such registers are really prescribed by law inasmuch as they are directed in the exercise of authority conferred by law; but it may well be held to be the official duty of a public servant to maintain registers directed by his superiors without any such formal legal authority. In the case of persons *other than public servants*, however, the duty must be specially enjoined by the law of the country in which the book, register, or record is kept. These latter words contemplate foreign or colonial registers. The burden of proving that the duty is so enjoined will be on the person who wishes to give the entry in evidence (see Section 104, *post*.)

In England it is essential to the admissibility of this evidence that the entries should have been made promptly, or at least without such long delay as to impair their credibility, and in the mode required by law, if any has been prescribed. The Indian Evidence Act contains no rule on these points, which may, however, be of importance in estimating the value of the evidence. In India as well as in England, the entry must have been made by a person whose duty it was to make it. The entry will be none the less admissible, even though the person who made it, being alive and capable of giving evidence, be not called as a witness.

As to the proof of the contents of public and official documents by certified copies or otherwise, see Sections 76, 77, and 78, *post*.

The following are examples of books, registers, and records in India, which come within the purview of the above section:—Log-books (see Sections 103—108, Act I of 1859, and Sections 280—285 of the Merchant Shipping Act, 17 & 18 Vict. Cap. 104)—Marriage Registers (see Sections 28, 32, and 54, and Schedules III and IV Act XV of 1872; 14 and 15 Vict. Cap. 40; Sections 14, 21, and 49 of the repealed Act V of 1852; the repealed Act XXV of 1864; Section 44, Act V of 1865; Section 6 and Schedule, Act XV of 1865 (Parsees); and Act III of 1872—Registers[1] directed by Part XI of the Indian Registration Act, III of 1877—Registers of printing-presses, newspapers, and books published in India, Act XXV of 1867—of Copy-Right, Act XX of 1847—of new Inventions, Designs, Patterns, &c. Section 11, Act XV of 1859, Act XIII of 1872—of Literary, Scientific and Charitable Societies, Act XXI of 1860—of Joint-stock Companies, &c., under the Indian Companies Act, X of 1866—of British Ships, Section 4, Act X of 1841; 17 & 18 Vict. Cap. 104—Registers prescribed by the various Municipal Acts—Pro-

[1] See also the repealed Acts VIII of 1871, XX of 1866, XVI of 1864, XI of 1351, XVIII of 1847, IV of 1845, XIX of 1843, I of 1843, XXX of 1838.

ceedings of Registered Companies and Municipal Committees, recorded in accordance with the provisions of the particular Act applicable thereto—of vessels on the river Indus, Act I (Bom. C.) of 1863—Quinquennial registers in the Bengal Presidency, *Srimati Udai Mani Debya and others* v. *Bishonath Dutt and others*, 7 W. R. Civ. Rul. 14, and see *Kashi Chandra Rai and others* v. *Núr Chandra Debya Chaudhrain and another*, 18th April, 1849, S. D. A. Decis. Beng. 113; and now, for the Lower Provinces of Bengal, the "Land Registration Act," VII (B. C.) of 1876—Records of Rights, Section 14 of the Panjáb Land-Revenue Act, XXXIII of 1871, and Section 94—106 of "the North-Western Provinces Land Revenue Act," XIX of 1873; and the Settlement record prescribed by clause 9, Section 9, Bengal Regulation VII. of 1822.

The reports of public officers, who have in the performance of their duty made inquiries and reported the result to the superior authorities, are often tendered in evidence in India. In the case of *Rájá Muttú Ramalinga Setupati* v. *Perianayagum Pellai* (L. R. 1 I. A. 239) the question was as to the existence of a customary right in a certain zemindar to grant confirmation of the election of a mohunt, and certain *reports of former Collectors* on the subject were used as evidence. Under Sections 10 and 11 of Madras Reg. VII of 1817, it was the duty of the Collectors to ascertain and report to the Board the names of managers of temples, the authority by whom they were appointed, the occurrence of vacancies, the claims of candidates and other matters. After noticing these provisions of the law, the Privy Council said:—"Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers, made in the course of duty and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded upon them." In *Rájá Lilanand Singh* v. *Mussamat Lakhpatí Thakurain* (22 W. R. 232) the report of a Special Commissioner was rejected, but the published judgments do not show under what authority (if any) he was appointed.]

Maps and plans when relevant.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to

matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.

[There are two kinds of maps and charts here spoken of, *viz.* (1) published maps or charts generally offered for public sale, and (2) maps or plans made under the authority of Government. The admissibility of the first kind depends on grounds similar to those on which a Judge may refer to a dictionary for the meaning of a word or to an historical work for information on matters of public history, &c. (see penultimate paragraph of Section 57, *post*.) The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. In the case of *Rájá Sahib Prahlad Sen* v. *Maharájá Rajendra Kishor Singh* (2 B. L. R. P. C. 139) their Lordships of the Privy Council referred to "any good general map of India." It may be observed that this section goes somewhat further than English law, under which the maps of the Ordnance Survey in Ireland, though notoriously drawn up with great care and accuracy, have been held inadmissible (*Swift* v. *McTiernan*, 2 Ir. Equity Reports, 632).

As to the second kind, the most important maps made under the authority of the Government of India are those of the great Trigonometrical Survey. In Bengal the Revenue Survey is conducted by two sets of officers, having distinct duties clearly defined. The Revenue Surveyor, directing the professional portion of the work, only surveys the *external* boundaries of villages. He has nothing to do with the *internal* measurements further than to calculate the areas of the *mahalwári* plots which the Superintendent of Survey may send to him for triangulation. The professional maps are, therefore, a record of the geographical and topographical features of villages, and do not incorporate any of the details which are depicted on the *tâk-bast* and *khasrá* maps only.[1] These latter are prepared by the Civil Department, consisting of a *Superintendent of Survey* aided by Deputy Collectors and an establishment of Amíns and Peshkárs. The work, preparatory to the professional survey, consists in demarcating the boundaries of villages and estates, and settling boundary disputes.[2] Such disputes are settled by Deputy Collectors invested with powers under Regulation VII of 1822 for this purpose. The *tâk-bast* (tâk—a mark, land-mark, boundary-mark) map embraces, besides the exterior boundaries of villages, the demarcation of the boundaries of every estate in the village. The village-boundaries are laid down in the

[1] Rules of the Revenue Department in the Lower Provinces of Bengal.
[2] *Idem.*

first instance, and then the position and boundaries of all estates having land in that village. The lands entitled to separate demarcation and distinct entry in the *tâk-bast* maps are: (1) Permanently settled revenue-paying estates; (2) Resumed tenures brought on the Revenue-Roll; (3) Confirmed revenue-free (*lakheraj*) tenures; (4) Detached blocks of any of the foregoing. *Khasrá* or detailed measurement is resorted to in the case of great interlacing of estates. On this map each field is separately defined. For a description of the *chitás* prepared during this measurement, see the *Appendix*. The co-operation of the parties interested in the measurement is directed to be sought. They are to be induced, if practicable, to make themselves acquainted with the contents of the *tâk-bast* and *khasrá* plans, and to sign them or state their objections in writing.[1]

It will be important to notice some of the decisions of the Courts as to the admissibility and effect of the maps and papers connected with the survey. In the case of *Gopinath Singh* v. *Anandmayi Debya and others* (8 W. R. Civ. Rul. 167) Bayley, J. said:—"The real point which we have to decide is, whether certain copies of *chitás, i. e.* measurement papers, and copy of a field-book of the Survey Department (these copies being certified by the Collector as taken from the records of his office) are to be received as evidence or not..... I am of opinion that these copies are evidence. In the *first* place, I think that they are admissible in the same way that Her Majesty's Privy Council admitted attested copies of somewhat similar records on the grounds stated in page 137, Moore's Indian Appeals, Vol. VII.[2] In the *second* place, I think that, as these papers are the primary records out of which a survey map is made, they are originally component parts of the map, and that thus they are receivable under Sections 11 and 13, Act II of 1855, as evidence of the fact of demarcation of lands and properties, measured and surveyed at or about the date of such map, and for the purposes of the State and of litigated questions respectively. Further, it may be noticed that before these survey measurements and survey field-book and survey map are made, notices are issued under Regulations VII of 1822 and IX of 1825 to parties who wish to be present and watch that their interests are not prejudiced, so that that these records cannot be said to be made in the absence of the parties, for legally they were present when they had the opportunity of being present. *Lastly*, I think under

[1] Rules of the Revenue Department in the Lower Provinces of Bengal.

[2] The passage here referred to is in the judgment in the case of *Unidi Rajaha Raje Venkataperumal Rauze Bahadûr* v *Pemmasami Venkatadry Naidú and others*, and will be found *ante* in the note at foot of page 14.

Section 56, Act II of 1855, the records referred to are admissible, because public officers are not at liberty to give originals to parties; and certificated copies of such official records have always ordinarily been received in this Court as evidence, and acted upon in deciding cases. The whole current of decisions will show this up to that of the Full Bench, 8 W. R. 338.[1] I would, therefore, receive these survey measurement papers and field-book." Markby, J. concurred.

In the case of *Eckauri Singh and others* v. *Hiralal Singh and others*, (11 W. R. P. C. 2; S. C. 2 B. L. R. P. C. 4) their Lordships of the Privy Council remarked as follows :—" To admit documents not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chitás* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents not legally admissible in proof against them. The document on page 19 appears to be only a copy, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the *chitás* in general in questions between the *zemindar* and his tenants or *raiyats*, to receive them as evidence of boundary against a rival proprietor without further account, introduction or verification would, if it obtained as a practice—and each relaxation is apt to become a precedent for another—tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it." There is nothing to show what was the nature of the *chitás* here offered in evidence, save that in the words of the judgment they were offered *without further account, introduction or verification*. In the case of *Sadakhina Chaudhrain* v. *Raj Mohan Bose* (3 B. L. R. A. C. 381) Bayley, J. referring to the above observations of their Lordships of the Privy Council, said :—" *There*, the Lords of Her Majesty's Privy Council speak of *chitás* as no evidence of title in boundary disputes between rival proprietors, when they are without further account, introduction or verification. But *here* are *chitás* and other documents which are shown by their character and attestation not

1 The case here referred to is that of *Kanhya Lal and others* v. *Radha Charan and others* bearing on the subject of judgments *inter partes* and *in rem* (see note to Section 41, *post*). An erroneous idea arose that the principles enunciated in this judgment were applicable to *tak-bast* maps or other similar surveys. In *Mott Lal and others* v. *The Rani, wife of Maharaja Bhup Sing Bahadur and others* (8 W. R. 66,) Peacock, C. J. however declared that there was no intention on the part of the Judges who delivered judgment in the case of *Kanhya Lal*, &c. to lay down any rule as to the admissibility or otherwise of *thak-bast* maps.

to be at least fabricated documents, as pleaded by the special appellants, and to be supported by evidence. Besides, there is the Amín's report, and on the deputation of the Amín both the parties filed *chitás* and other papers of the same character before him in support of their respective allegations." Hobhouse, J. taking the same view, said:—"By these words it seems to me their Lordships held that, if *chitás* are relied upon without any account given or verification made of them, then they are not to be considered as evidence; but here an account was given of the *chitás*, and they were properly introduced and verified, and therefore that remark of their Lordships does not seem to me to apply to the *chitás* now before us. They were, therefore, I think properly used as evidence in this case." It may here be observed that the reports do not always show what was the precise nature of the *chitás* offered in evidence in each particular case; and to this may be attributable some of the difference of opinion which seems to prevail on the subject in question. There is and ought to be a wide distinction, as regards both weight and admissibility, between the *chitás* and other measurement papers of the Revenue Survey of the country, designed and carried out as an executive act of State; the similar papers of a decennial survey made under the provisions of Act IX of 1847 (see p. 207); the *chitás* of a measurement of a particular *khas mehal* made by Government as zemindar; the *chitás* of a measurement made by a private zemindar at a time when all was peace between him and his *raiyats*; and the *chitás* of a measurement made by the same zemindar when disputes had arisen as to enhancement of rents, and a measurement could be made at all only by resort to the stringent provisions of Sections 9, 10, and 11 of Act VI (B. C.) of 1862 or the corresponding Sections 37, 38, 39, 40, and 41 of Act VIII (B. C.) of 1869. If the original records of the reported cases were examined with reference to this distinction, it is more than probable that any seeming difference of opinion may be found reconcilable with sound and uniform principle. Where certain *chitás* were produced by the plaintiff as evidence of certain lands being *mál* or rent-paying, it was held that they were sufficiently attested by the deposition of the village gomashtah that they were the *chitás* of the village while he was gomashtah, and that he had been present when, with their assistance, a *purtal* (new, revised,) measurement had been carried out in the village (*Debi Persad Chattopadhya* v. *Ram Kumar Ghosal and others*, 10 W. R. 443). The *chitás* of the Government Survey have been always held admissible as evidence in cases in the Chittagong District (*Mahomed Fedei Sirdar* v. *Ozi-udin and others*, 10 W. R. 340). In this district the estates are very small, smaller than in most other districts in Lower Bengal, so that *khasra* or detailed mea-

surement was largely resorted to by the survey authorities. As to the value of these *chitás* the following observations were made in another case from the same district:—"I think also that there is nothing in the objection that the Judge was wrong in law in looking at the survey *chitás*. The Judge was in no way wrong in relying upon them to a certain extent as he did, as corroborating the other substantial evidence in the case. Of course the *chitás* would not have been evidence in themselves, if unsupported by other substantial evidence; but as there was other evidence, and the *chitás* were treated merely as corroborative, I think the appeal fails and must be dismissed,"—per Macpherson, J. *Srimati Arman Bibi and others* v. *Srimati Amiranissa and another*, Special Appeal No. 1294 of 1871 decided on 28th February, 1872, by Calcutta High Court. In the following cases *chitás* of the Government survey were admitted:—*Sarosati Dasi* v. *Ambika Nand Biswas*, &c. 24 W. R. 192: *Mochiram Majhi*, &c. v. *Bissambhar Rai Chaudhri*, 24 W. R. 410.[1]

As to the value in evidence of survey maps and proceedings of the Survey Authorities, there have been numerous decisions, not all quite uniform. In *Lalit Narain Singh and others* v. *Narain Singh and others* (1. W. R. Civ. Rul. 333) it was observed that survey proceedings are not conclusive as to title. To the same effect is the case of *Kailas Chandra Ghose* v. *Raj Chandra Bandapadhya*, (12 W. R. 180) in which it was held that an award by the Superintendent of Survey is not conclusive evidence of a contested right in a regular suit. In *Mahomed Meher Chaudhri and others* v. *Sib Persad Sarmah and others* (6 W. R. Civ. Rul. 267) it was said:—"The law requires the Revenue Authorities to survey and make *ták* according to possession; but it may happen that a party not in possession may succeed in obtaining a *ták* favorable to his interests and prejudical to those of the party actually in possession, to set aside which the latter must be obliged to sue in a Civil Court. The Lower Appellate Court, by holding the survey map to be of itself conclusive proof of possession by the defendant, has attached much more weight to to it than it legally deserved in a case like this, brought to show that it was wrongly prepared." In *Mahima Chandra Chakravartti* v. *Raj Kumar Chakravartti* (1. B. L. R. A. C. 5) Peacock, C. J. said of an award and map made under Regulations VII of 1822 and IX of 1825:—"The award and the map do not *determine* the title of the parties, nor are they evidence of title." This must

[1] The following cases relate to *chitás* other than those of the Government survey—*chitás* made by *zemindars* or by Government in the capacity of a *zemindar*:—*Gopal Chandra Saha*, &c. v. *Madhab Chandra Saha*, &c. 21 W. R. 29 (*Batwara chitás* no evidence between the *raiyats* of the zemindars): *Krishno Chandra Gupto*, &c. v. *Mir Safdar Ali*, 22 W. R. 327: *Sham Chand Ghose*, &c. v. *Ram Kristo Bewrah*, &c. 19 W. R. 309.

however, be understood with reference to the facts of that particular case, in which the award and the map were the very subjects of litigation. In *Kamodini Debya* v. *Púrna Chandra Mukhapadhya* (10 W. R. 301) it was said that, under Section 13, Act II of 1855, Government survey maps are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down: further than this they are not evidence as to rights of ownership.

That survey maps and survey proceedings are good evidence of possession and in this way evidence, though not conclusive evidence, of title, is a proposition well supported by many decisions:—See *The Collector of Rajshaye* v. *Dúrga Sundarí Debya*, 2 W. R. Civ. Rul. 210: *Shaushi Mukhí Dasya, &c.* v. *Bissessurí Debya*, 10 W. R. 343: *Kashí Kishore Rai Chaudhrí* v. *Bama Sundarí Debya Chaudhrain* &c. 23 W. R. 27 (The survey award of 1855, if it was made relative to the land which is the subject of this suit, is unquestionably evidence *quantum valeat* as between the parties of the fact of possession on the part of the plaintiff at the date of the award—per Phear, J.): *Jagdish Chandra Biswas, &c.*, v. *Chaudhri Zahúr ul-huq*, &c. 24 W. R. 317: *Ram Narain Das* v. *Mahesh Chandra Banerji, &c.* 19 W. R. 202. In this last case the High Court (Markby, J.) declined to lay down any rule as to whether or not these documents require corroboration from any other source.[1] In connection with the subject of the evidence afforded by proceedings of the Survey Authorities clause (*b*,) of Section 13, *ante* must be borne in mind.

The Revenue Survey of Bengal was not made under any Act of the Legislature. Act IX of 1847, however, recites the fact of such a survey being made under the authority of Government; and Section 3 of the same Act enacts that it shall be lawful for the Government of Bengal, in all districts or parts of districts, of which a Revenue survey may have been or may hereafter be completed

[1] Survey proceedings and survey maps, being public documents, are of course provable by certified copies (See Sections 74—77, *post*). Unfortunately however these copies and occasionally the maps made by public officers are prepared with little skill. The Calcutta High Court in their Circular Order No. 3 of the 9th February, 1874, found it necessary to impress on all judicial officers the importance of having copies of survey maps made only by persons actually acquainted with drafting and surveying In the case of *Protab Chandra Buroah* v. *Rani Surnamayi*, &c. 19 W. R. 364, their Lordships of the Privy Council, having observed upon the hopelessness of attempting to determine the issue in the case by a comparison of the so-called maps, which they characterized as rather rude diagrams than maps in the proper sense of the term, said that they "must express their surprise and regret that suitors in India, who obviously do not shrink from carrying on litigation at an enormous cost, should not be at the pains of causing the maps, which are supposed to be essential to its right determination, to be prepared on something like a scientific principle."

and approved by Government to direct from time to time, *whenever ten years from the approval of any such survey shall have expired*, a new survey of lands on the banks of rivers, and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last survey, and to cause new maps to be made according to such new survey. Alluvion and diluvion are constantly going on throughout the whole delta of Lower Bengal traversed by the various branches of the great rivers Ganges and Brahmaputra. The other Sections of the Act declare the dates on which the Revenue survey of certain districts shall be deemed to have been approved, and as to other districts that the approval shall be deemed to have taken place on such date as may be notified in the *Calcutta Government Gazette ;* and provide for abatement of the Government revenue where diluvion has taken place, and increase thereof where alluvion has added to the area of the estate. See also Acts XXXI of 1858 and IV (B. C.) of 1868.

Section 13 of the repealed Act II of 1855 was as follows :—"All maps made under the authority of Government or of any public municipal body, and not made for the purpose of any litigated question, shall *primâ facie* be deemed to be correct, and shall be admitted in evidence without further proof." To the same effect, but slightly different, is Section 83 of the present Act—"The Court *shall presume* that maps or plans purporting to be made by the authority of Government were so made, and *are accurate ;* but maps or plans made for the purposes of any cause must be proved to be accurate." This section is silent as to maps made under the authority of any public municipal body. As to the effect of the words "shall presume" see Section 4, *ante*, page 81. Under the provisions of Section 87, *post*, the Court *may presume* that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published. It may also be observed that the presumption provided for by Section 90, *post*, will apply to a map or chart as well as to any other document, purporting or proved to be thirty years old.]

Statement as to fact of public nature contained in any Act or Notification of Government, when relevant.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor-General of India in Council, or of the Governors in Council

of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the Government Gazette of any colony or possession of the Queen, is a relevant fact.

[In the case of the *Queen* v. *Amirudin* (7 B. L. R. 63) the *Gazette of India* and the *Calcutta Gazette*, containing official letters on the subject of hostilities between the British Government and certain Muhammadan fanatics on the frontier, were held to have been rightly admitted in evidence under Sections 6 and 8 of the repealed Act, II of 1855, to prove the commencement, continuation, and determination of hostilities: and, under Section 6 of the same Act, a printed letter from the Secretary to the Government of the Panjáb to the Secretary to the Government of India was ruled to have been properly used as a document of reference (see penultimate para. of Section 57, *post*) for the same purpose, though the letter (it was observed) was not evidence of the facts mentioned in detail by the writer thereof. In the subsequent trial of the Wahábí conspirators at Patna, the *Gazette* was used in evidence for a similar purpose. It may be observed that the Section does not specifically mention recitals contained in the Bengal, Madras, and Bombay Regulations passed up to 1834, A. D.

The fact, as to the existence of which the Court has to form an opinion, must be *a fact of a public nature*. In connection with the present Section may be read Section 57 as to judicial notice of Acts, &c.; Section 78, as to the mode of proving notifications and other official documents; and Section 87, as to presumptions concerning Gazettes; as also "The Documentary Evidence Act, 1868," 31 Vict. Cap. 37 (see note to Section 78, *post*).

Previous to 1863, the Government of India had no exclusive organ of its own, its notifications, orders, &c. being published in any of the Gazettes of the Local Governments, as was necessary. In that year the *Gazette of India* was first published as the Gazette of the Government of India exclusively; and Act XXXI of 1863 was passed to give to publication in the *Gazette of India* the same effect as publication in any other Gazette in which publication was prescribed by the law then in force.

Mr. Taylor, speaking of the admissibility and effect of public documents, observes that, "if their contents be pertinent to the issue, they will generally be admissible, either as *primâ facie* or as conclusive proof

English Law.

of the facts directly stated in them; and in many cases they will be received in evidence even of such matters as are inserted in them by way of introductory recital. Thus, where certain *public Statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued with similar recitals and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages to support the averments to that effect in an information for a libel on the Government in relation thereto.[1] So a recital of a state of war in the preamble of a public Statute is good evidence of its existence, and the war will be taken notice of without proof, whether this nation be or be not a party to it.[2] So a recital of relationship, even in a *private* act, has been received by the House of Lords as cogent evidence of a pedigree in a peerage case; because such recitals *used* never to be inserted in a private act, unless their truth had first been ascertained by the Judges, to whom the bill had been referred. As, however, the evidence in support of private bills is no longer submitted to the Judges for approval, recitals inserted in them since this change in the practice would seem to be inadmissible; for, as a general rule, a local or private Statute, though it contains a clause requiring it to be judicially noticed, is not as against *strangers* any evidence of the facts recited; neither does it affect the public with a knowledge of its contents. The recitals, too, in a *public act are not conclusive evidence*: and, therefore, where the schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false." (§ 1473.)

Gazettes, as well as other newspapers, are frequently offered in evidence, with the view of fixing the adversary with the *knowledge* of certain facts advertised therein; but it is always advisable, and sometimes necessary, *unless the case is governed by a special Act*, to furnish some evidence, from which it may be inferred that the party affected by the notice has read it. This may be done by proving that the person has been in the habit of taking in the gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice. The *Gazette* containing *a notice of dissolution of partnership* is admissible, without any additional proof, against all persons who have had no previous dealings with the firm, though to those who have had such dealings the knowledge of such notice must be brought home, or proof be afforded of a special notice

[1] *Reg.* v. *Sutton*, 4 Maule and Selwyn's Reports, 532.
[2] *Reg.* v. *De Berenger*, 3 *id.* 67, 69.

having been given by circular or otherwise: but see Section 264 of the Indian Contract Act, IX of 1872.]

Statements in Law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

["any country" will include India, England, and foreign countries. Books of Reports have at all times been admitted in the Courts of a country as evidence of the law of that country: and here the section only acknowledges and legalizes the practice of the Courts. But so far as *foreign* law is concerned, it is an innovation on the English Law of Evidence, which requires the laws, as well written as unwritten, and the usages and customs of *Foreign States*, to be proved by calling professional or official persons to give their opinions on the subject; and will not allow books of such law to be directly referred to, although, as in matters of science, the witness may refresh his memory by referring to text-books, decisions, statutes, codes, &c. It will be observed, however, that the books, in order to be admissible under the above section, must purport to be printed or published under *the authority of the Government* of such country; and must also purport to contain such law. Reports of rulings need not, however, be published under authority, if only the book containing them purport to be a report of the rulings of the Courts of such country.

For other methods of proving foreign law, see Section 45, *post*, and the note thereto: and in connection with the present section read Section 84, *post*, which enacts that the Court *shall presume* (see Section 4) the genuineness of the books here mentioned.]

How much of a Statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of

a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

["Though the whole of a document," says Mr. Taylor, "may at Common Law be read by the one party where the other has already put in evidence a partial extract, this rule will not warrant the reading of *distinct entries* in an account-book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent; nor will it render admissible [illegible] of proceedings in bankruptcy, entries in corporation-books, [illegible] series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers or entries or letters. If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books *may* throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission, for such party is not bound to know whether they will or not; and, moreover, the light may be a false one." The same rule prevails in the case of a *conversation*, in which several distinct matters have been discussed. It was at one time held that if a witness were questioned as to a statement made by an adverse party, such party might lay before the Court the whole of what was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit: yet a sense of the extreme injustice that might result from allowing such a course of proceeding, has induced the Courts in later times to adopt a stricter rule; and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the Court. This was decided in the case of *Prince* v. *Samo*,[1] which was an action for malicious arrest for debt, the plaintiff contending that the money had been a gift, not a loan. A witness for the plaintiff acknowledged, on cross-examination, that he had heard the plaintiff admit on oath that he had repeatedly been insolvent, and had been remanded by the Court. He was then asked in re-examination whether the

[1] 7 Adolphus and Ellis' Reports, 627.

plaintiff had not on the same occasion expressly stated that the money was *given* and not *lent*. The Court, in holding that the answer to this question was not evidence, observed that if it were, "the jury would be bound to consider it, and might give full effect to it, and thus award large damages for an injury of which no particle of proof could be found but the plaintiff's own assertion;" and it was added that "the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."

A party may put in letters written by his opponent without producing or calling for the production of those to which they are answers, these latter being in the adversary's hands, who can produce them, if he thinks them necessary, to explain the transaction. If there be something written on the back by the person producing them, the other side is entitled to have the whole of it read. Where a defendant produced several letters between himself and the plaintiff, he was allowed to read his own reply to the last one, this being considered as part of an entire correspondence.[1]]

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order, or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

[The law, by which a prior judgment, order, or decree prevents a Civil Court from taking cognizance of a suit, is contained in the Code of Civil Procedure: and the law, by which a prior judgment or order prevents a Criminal Court from holding a trial, is contained in the Code of Criminal Procedure. It has been already observed (*ante*, Introduction, p. 5) that most English writers deal with this subject under the head of *Evidence*; but the authors of the Indian Codes have regarded it as belonging more properly to the head of *Procedure*. It is proposed to explain in this Note the rules prescribed by these Codes and the principles upon which these rules are founded, because it is necessary to understand these rules and principles in order to understand the above section of the Evidence Act and other sections concerned with the use of judgments as evidence.

[1] See Taylor, §§ 661, 662, and 663.

It is a settled principle that a matter, which has been put in issue, tried and determined by a competent Civil or Criminal Court, cannot be re-opened as between those who were parties to such adjudication, or their privies. This rule consists with justice to the individual, for *nemo debet bis vexari, si constat curiæ quod sit pro unâ eâdem causâ*[1]—and with public policy, for *interest reipublicæ ut sit finis litium.*[2] If matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion.[3] "If," said Lord Kenyon, C. J., "an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment;" and again—"After a recovery by process of law, there must be an end of litigation; if it were otherwise, there would be no security for any person."

The Rule and the Reason for it.

In the Duchess of Kingston's case, Sir William De Grey, C. J. delivering the unanimous opinion of the Judges present, stated the rule in the following terms[4]—"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: *first*, that the judgment of a Court of *concurrent* jurisdiction *directly upon the point*, is, as a plea, a bar, or, as evidence, conclusive *between the same parties upon the same matter* directly in question in another Court; *secondly*, that the judgment of a Court of *exclusive* jurisdiction directly upon the point, is, in like manner, *conclusive upon the same matter between the same parties coming incidentally in question* in another Court for a *different* purpose: but neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter *incidentally cognizable*, nor of any matter to be *inferred by argument* from the judgment." In the case of *Khagauli Singh* v. *Hosein Baksh Khan* (7 B. L. R. 673) the Lords of the Privy Council, having quoted the rule as stated by Sir William

Rule how stated in Duchess of Kingston's case.

This Rule equally applicable to India.

1 "No one ought to be twice harassed, if it be clear to the Court that it is for one and the same cause."

2 "It is for the benefit of the State that there should be a limit to litigation."

3 2 Smith's Leading Cases, 777, Note to Duchess of Kingston's case.

4 2 Smith's Leading Cases, 7th ed. 761.

De Grey, C. J., said—"There is nothing technical nor peculiar to the law of England in the rule as so stated. It was recognized by the Civil law,[1] and it is perfectly consistent with the second section of the Code of Procedure[2] under which this case was tried." There is thus the very highest authority for applying to the decision of cases in India the principle laid down in the Duchess of Kingston's case.

I propose to deal first with the rule as applicable to Civil cases. This rule is now embodied in the thirteenth Section of the Code of Civil Procedure (Act X of 1877) which enacts as follows:—"No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

Res judicata.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party, and either denied or confessed expressly or impliedly by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence in a former suit brought by the defendant against the plaintiff, shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence

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[1] See Broom's Legal Maxims, pp. 321,323, and the *exceptio rei judicatæ* of Roman law there explained. See also Tomkins' and Jenckin's Modern Roman Law, p. 94.

[2] *i. e.* of the first Code, Act VIII of 1859. The Section was as follows:—"The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim."

that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction."

It will be convenient to consider these provisions under the following heads, *viz* :—

I.—In what cases is the matter, directly and substantially in issue in the second suit or issue, *the same matter*, which was determined in the former suit or issue?

II.—In what cases must it be held that this matter was *heard and finally decided* in the former suit?

III.—In what cases must this matter be held to have been decided by *a Court* of *competent jurisdiction?*

IV.—In what cases must the former suit be held to have been between *the same parties or between parties under whom they or any of them claim, litigating under the same title?*

I.—The former judgment is conclusive only upon the same matter. The section of the Code of Civil Procedure precludes the Courts from trying any suit or issue, in which the matter *directly and substantially in issue* was heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties, &c. The second Explanation adds that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter *directly and substantially in issue* in such suit. It is to be observed that the words '*directly and substantially in issue*' in the section refer to the second suit, while the same words in the Explanation have reference to the former suit. The construction of the Explanation with the section is therefore not very easy, but there can be little doubt that what was intended is, that the Courts may not try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit, was heard and finally decided therein. To use the language of the English authorities, the former judgment must have been directly *upon the point*. "Neither the judgment of a concurrent nor exclusive jurisdiction," said De Grey, C. J., in the Duchess of Kingston's case, "is evidence of any matter which *came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*"

Former Judgment conclusive only on same matter.

Not conclusive when the point was merely a collateral point in the former suit.

It may be useful to illustrate this language by some cases decided in India while the first Code of Civil Procedure was in force. Where a landlord sued his tenant for a *kabuliyat* at an enhanced rate of rent, and the latter pleaded that he was not a *raiyat* but a *talukdár*

and therefore not liable to enhancement, and the Revenue Court decided against him the question thus raised, as incidental to the real point at issue as to the *kabuliyat*; and the tenant brought a suit in the Civil Court and obtained a decree declaratory of his rights as a *talukdár*, and then sued in the Revenue Court for abatement of rent, it was held that the previous decision of this Court was not a bar to the trial of the abatement suit. "It cannot be said," it was observed, "because a Court of competent jurisdiction, in deciding upon a particular subject-matter, thought it necessary to go into collateral facts for the purposes of that decision, that the opinion of that Court on those collateral facts is conclusively binding in a subsequent suit which relates to a different subject-matter" (*Mahdú Ram Dey* v. *Beidonath Dass and others*, 9 W. R. Civ. Rul. 592). It is to be observed however that the Revenue Court, though competent to deal with the claim to a *kabuliyat*, was not competent to give a binding decision on the question of title raised in the first suit. Its decision granting a *kabuliyat for a year* at an enhanced rent proceeded on this view taken by the Revenue Court as to the question of title. When this question was authoritatively settled otherwise, and the former decree had exhausted its force on the expiry of the term of the *kabuliyat*, the Revenue Court was bound to act upon the new basis upon which the plaintiff came before it. In the case of *Raghúram Biswas and others* v. *Ram Chandra Dobey and another* (Suth. S. C. C. Ref. 51), which was a suit to recover damages for the value of some mangoe trees cut down and removed by the defendant, it was held by a Full Bench that a Court of Small Causes could try the question of the title to the land as an incidental question, the decision of which was necessary to the adjudication on the claim for damages; but it was remarked that the judgment on this point would not be conclusive except so far as regarded the right to the damages claimed. Here the point, besides being a collateral one, was also one which the Court of Small Causes had no jurisdiction to try definitively. So, where in a suit for rent the defendant pleaded a bond authorizing him to appropriate a certain portion of his rent in reduction of the amount due to him under the bond, the decision of the Revenue Court as to the genuineness of the bond was held not to be a bar to the trial of the same question by the Civil Court in a suit on the bond between the same parties, the Revenue Court not being a Court having jurisdiction concurrent with that of the Civil Court to decide the question. "It is unnecessary for me," said Peacock, C. J., "to determine whether the matter did or did not come collaterally in question before the Collector. If it were necessary for me to determine that question, I should say that it did. But

I think it unnecessary to determine that question, because it is clear that the Courts are not Courts of concurrent jurisdiction (*Mussamat Edan* v. *Mussamat Bechan*, 8 W. R. Civ. Rul. 175; S. C. 2 Jur. N. S. 264). In all these cases the Court which decided the point in the first instance was not a Court which had jurisdiction to pass a binding decision thereupon. The following case is somewhat different. A sued B in the regular Civil Court to recover damages for the taking away by the latter of some mangoes which grew on land to which A set up a right. The question of *title* thus raised was tried incidentally in the suit for damages, and decided in favour of A. B subsequently brought a suit against A for a declaration of right and confirmation of possession, to set aside a survey award, and to have a *takbast* map amended. "It is clear," said Peacock, C. J., "that the cause of action to recover damages for the mangoes, and a suit brought to have a declaration of right, and to set aside a *takbast* proceeding, are not the same; and the plaintiff is not barred by Section 2, Act VIII of 1859: nor is he estopped by the decision in the suit relating to the mangoes upon a point which came *collaterally* in issue. It is contended that in that suit the plaintiff paid the stamp-duty upon a valuation not merely of the mangoes, which he sought to recover, but of the lands which he did not seek to recover. But the fact of the plaintiff's having paid a higher stamp-duty in that suit than he was by law bound to pay, cannot affect the rights of the parties in the present suit (*Mahima Chandra Chakravartti* v. *Raj Kúmar Chakravartti*, 1 B. L. R. A. C. 4). Here it will be observed that the regular Civil Court (it was a Munsif's Court) would have had jurisdiction in the first case to try the title to the land, if the value thereof were within the pecuniary limits of its jurisdiction. Whether the case was so within the Munsif's jurisdiction does not appear from the report. The decision on the question of title was however held not to have the force of an estoppel in the second case, because it had been given upon a *collateral* point. The decision in this case seems to have turned as much upon the fact that the *causes of action* in the two suits were different as upon the point decided in the first case being a *collateral* point. It is to be observed that the term 'cause of action'[1] is not used in the section of the present Civil

[1] The exact meaning of the term 'cause of action' has been the subject of considerable discussion in India as well as England. In *De Souza* v. *Coles* (3 Mad. H. C. Rep. 384) Bittleston, J. was of opinion that the *cause of action* means the whole cause of action; and the whole cause of action includes every fact essential to the maintenance of the action, and each of these fact separately is but a part of the cause of action. Holloway, J. held that, irrespectively of the domicile of the defendant, there is a competent *forum* wherever a place can be indicated to which the right and its infraction can both be referred, because there is a cause of action and the whole cause of action—that in fact a truly scientific meaning of the term 'cause of action' embraces nothing more than the right resident in the plaintiff

Procedure Code. In the case of *Chandra Kúmar Mandal* v. *Nani Khanum* (11 B. L. R. 434) the facts were as follow:—In 1866 A, a *raiyat*, brought a suit against B in the Revenue Court under cl. 6 s. 23 Act X of 1859, to recover possession of a piece of land, alleging that he had been in possession thereof under a *maurasí patta*, and had been illegally ejected. B alleged that the *maurasí patta* was spurious. The Deputy Collector tried the question thus raised, found the *patta* to be genuine, and gave A a decree, which was confirmed in appeal. A was restored to possession under this decree. B subsequently brought a suit against the heirs of A in the regular Civil Court for the recovery of possession of the piece of land, alleging that the *maurasí patta* was spurious. It was contended that B was concluded on this point by the decision of the Revenue Court in the former suit; but it was held that the matter was not *res judicata*. Couch, C. J. said:—" The Deputy Collector had to determine two questions—Was the plaintiff a tenant of the land? Had he been illegally ejected by the person entitled to receive rent for it? To determine the first of these it was necessary for him to find whether the alleged lease was genuine: but the real judgment in the suit was that the plaintiff was a tenant, the *patta* being the proof of it. The Deputy Collector had no jurisdiction to give effect to the *patta* as a permanent title; he could only use it as showing that, at that time, the plaintiff had a right to the possession of the land..... The suit now before the Court is against the heirs of A, whose case is that he had a *maurasí patta*; but the Deputy Collector had not power in the suit before him to adjudge that the tenancy

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See also *Harjiban Das* v. *Bhagwan Das*, 7 B. L. R. 109: *Mohan Lal Bhaya Gayal* v. *Lachman Lal*, 5 B. L. R. 675: and *Chandra Kúmar Mandal* v. *Nani Khanum*, 11 B. L. R. 442. Turning to the English cases, the Court of Queen's Bench held that 'cause of action' in Section 18 of the Common Law Procedure Act, 1852, meant 'all the facts which together constitute the plaintiff's right to maintain the action' (*Allhusen* v. *Malgarejo*, L. R. 3 Q. B. 340: *Cherry* v. *Thompson*, L. R. 7 Q. B. 573). The Court of Common Pleas on the other hand decided that 'cause of action' in this Section means, not the whole cause of action, *i. e.* the contract and the breach, but a substantial part of the cause of action, such as the act on the part of the defendant which gives the plaintiff his case of complaint (*Jackson* v. *Spittall*, L. R. 5 C. P. 542). The Court of Exchequer were equally divided in *Durham* v. *Spence*, L. R. 6 Ex. 46. Finally in the case of *Vaughan* v. *Weldon* (L R. 10 C. P. 48) it was announced that the Judges of all the Courts had determined to follow the view taken in *Jackson* v. *Spittall*, the Court of Queen's Bench yielding not from conviction, but to secure uniformity.[x] The Rules of Court made under the Judicature Act are in accordance with this determination, Order X. Rule 1 providing that service out of the jurisdiction may be allowed....wherever the contract which is sought to be enforced or rescinded.....was made or entered into within the jurisdiction, *and whenever there has been a breach within the jurisdiction of any contract wherever made.* The term 'cause of action' occurs in Sections 12, 17, 26, 43, 44, 45, 46, 56, 361, 362, 363, &c. of the new Civil Procedure Code, but the definition proposed in the draft bill has been omitted in the Act as passed.

x This view has been adopted in India – Lalji Lal v Hardey Narain 2 L R 9 Cal 105; Abdul Kadar v. East-India R. Coy 2 L R 1 Mad 3;

was hereditary; and, if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction. His finding upon the *patta*, except so far as it established the right of A to the possession of the land when he was ejected, must be considered a finding upon a collateral matter." Phear, J. held that, although the Deputy Collector was unquestionably competent to try the issue as to the *patta* for the purpose of the suit before him, his decision did not effect a *res adjudicata* between the parties for all other purposes, and this for both the reasons given by Sir W. De Grey in *The Duchess of Kingston's case*; *first*, the Collector had not concurrent jurisdiction with the Civil Court to the full extent of the matter involved in that issue; *second*, the issue as to the execution and authenticity of the *patta* was a question of evidence collateral to the matter which the Collector had to determine. In a suit brought for the redemption of certain land from mortgage, the defendants pleaded that they had been in possession for upwards of twenty years under two deeds of absolute sale. The plaintiffs alleged that the real transaction was a mortgage by way of conditional sale for securing the sum of Rs. 4,000 with interest, and they relied upon an *ikrarnáma* or deed to this effect, and of even date with the deeds of sale. The defendants had previously, in 1863, brought a suit for arrears of rent of 37 *bigas* against one of the plaintiffs, who had successfully contended that these 37 *bigas* formed a portion of 75 *bigas*, part of the whole estate, which he and the other alleged mortgagors were, under a particular stipulation in the *ikrarnáma*, entitled to hold rent-free. The Deputy Collector in the suit for arrears of rent had tried the question of the validity of the *ikrarnáma*, and had decided that the real transaction was not an absolute sale but a mortgage. In the redemption suit, it was sought to use this judgment of the Deputy Collector as an estoppel between the parties, and the Agra High Court gave effect to it as such. An appeal was preferred to the Privy Council, and their Lordships, in reversing the decree of the High Court, observed as follows:—"The judgment of the High Court is founded solely upon the omission of the Judge below to give due weight to the fact that the *ikrarnáma* had been declared to be valid and genuine by the Deputy Collector, and it treats that finding as *res adjudicata* between the parties. But, if the judgment of the Deputy Collector had been final in the matter before him, his incidental finding that the *ikrarnáma* was a valid instrument would not be conclusive between the parties in the present litigation: *for the question before him was not the issue now raised between the parties; and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try sum-*

mary suits for the recovery of rent. The eadem causa petendi, *and judgment of a Court of competent or concurrent jurisdiction, are both wanting here*" (*Khagauli Singh* v. *Hosein Baksh Khan*, 7 B. L. R. 673). Referring to this judgment, Markby, J. said in *Hari Sunker Mukherji* v. *Muktaram Patro* (15 B. L. R. 240):—"The question was whether the finding of the Collector as to the validity of the *ikrarnáma* was conclusive. Upon this the Privy Council say that the Collector's finding that the *ikrarnáma* was genuine, even if final, was 'incidental;' and this for two reasons: *first*, because the question before him was not the issue raised in the second suit; and *secondly*, because his decision was not that of a Court competent to adjudicate on a question of title." The case of *Hari Sunker Mukherji* v. *Muktaram Patro* was brought in the Civil Court under Act VIII (B. C.) of 1869 to recover rent at an enhanced rate after notice. The defendant pleaded that a portion of the land, for which rent was claimed, was *lakheraj* or rent-free. In a previous suit brought in the Revenue Court under the provisions of Act X of 1859, it had been decided that this land was not *lakheraj*, and that the plaintiff was entitled to assess rent thereupon. This decision was pleaded as concluding the parties upon the point; but it was held that it was not conclusive, and that the matter was not *res judicata*. It was observed in referring the case to a Full Bench that the result of all the decisions after much conflict is, that questions of title cannot be determined finally by suit instituted in the Revenue Courts; and the majority of the Full Bench accordingly held that the Revenue Court, not being competent to decide the question finally,[1] was not a Court of concurrent jurisdiction with the Civil Court, and that therefore its judgment did not render the matter *res judicata*.[2]

What is a collateral point?

From the above cases it would appear that a point, decided by a Court of limited jurisdiction as ancillary to a question, the final decision of which is while the final decision of such point is not, within the competence of its limited jurisdiction, has been regarded as a collateral point. If the final decision of the point be

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[1] The report of this case does not show whether the alleged *lakheraj* was created before or after 1790. If created after 1790, it might be argued that the Revenue (Collectors?) Court had concurrent jurisdiction—see the Author's edition of the Bengal Regulations, pp. 249-255.

[2] The majority also expressed an opinion that the judgment, though not conclusive on the principle of *res judicata*, was clearly admissible as evidence (s. 11 s. 13 of the Evidence Act), and the Civil Court was bound to give weight to the decision of the Revenue Court.

within the competence of the Court, it seems to be immaterial whether the point be ancillary to the main question, or be itself the main question decided in the suit—the decision will be equally binding. For example, the point whether a plot of the land for which rent was claimed in *Hari Sunker Mukherji* v. *Muktaram Patro* was or was not *lakheraj*, was ancillary to the main question decided in the suit, *viz.* whether plaintiff was entitled to recover the rent claimed; but if the final decision of this point had been within the competence of the Court, its decision would have been final: and this was exactly the case in *Mahima Chandra Mazumdar*, &c. v. *Asradha Dassia* (15 B. L. R. 251 note), in which the question of *lakheraj* title in the former suit for rent was decided by the Civil Court, the suit for rent being instituted before the Munsif under the provisions of Act VIII (B.C.) of 1869. See also *Mahesh Chandra Bandopadhya* v. *Jai Kissen Mukherji* (15 B. L. R. 248 note[1]). So, if the point as to the *maurasi patta* in *Chandra Kúmar Mandal* v. *Nani Khanum* had been tried by a Civil Court under Act VIII (B.C.) of 1869, instead of by a Revenue Court under Act X of of 1859, the decision on the point would have been binding upon the parties in any subsequent suit for the rent of other years. The term "collateral" is not used in the section of the present Code of Civil Procedure; but the language actually used involves similar results, for the matter must have been heard and *finally decided by a Court of competent jurisdiction*. According to the Explanation (IV) a decision is final when it is such as the Court making it could not alter (except on review) on the application of either party, or re-consider of its own motion; and a decision liable to appeal is final until the appeal is made.[2]

It has been already suggested that the words "directly and substantially in issue" must be referred to the former as well as to the latter suit. The first Explanation favours this view. "The matter must in the former suit have been alleged by one party and either denied or confessed, expressly or impliedly, by the other." If confessed, which is doubtless synonymous with "admitted," the

[1] In the judgment of the majority in *Hari Sanker Mukherji* v. *Muktaram Patro* it is said:—"It is only with regard to matters decided in suits under Act X of 1859 that the question which is the subject of this reference can arise; for under Bengal Act VIII of 1869 the decision of the Civil Court in a suit for rent, as in any other kind of suit, will no doubt be conclusive in a subsequent suit between the same parties." It may be observed, however, that a similar question may at any time arise when a Munsif, in order to decide a question within the limits of his pecuniary jurisdiction, has to deal with an ancillary point above those limits, *e. g.* a claim to Rs. 500, alleged unpaid balance of rent, might involve the decision of the genuineness of a lease reserving an annual rent of Rs. 5,000.

[2] Is it final during the period between the appeal being made and decided?

admission, being of record, would have the effect of an estoppel,[1] unless indeed it were made and taken merely for the purposes of the particular suit, in which case the matter thereof could not be said to have been *finally decided*. If alleged by one party and denied by the other, the matter must have been directly and substantially in issue. In *Boileau* v. *Rutlin* (2 Exch. 665) Park, B. suggested that pleadings are not to be treated as allegations of the truth of the facts stated therein for all purposes, but only as statements of the case of the party for the purposes of the suit, to be admitted or denied, and if denied, to be submitted to judicial decision—that facts actually decided by an issue in a suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party, which are directly admitted by the opposite party or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it: but the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not to be treated as admissions for all purposes of the truth of the facts stated. Matter alleged in the written statements of the parties may be relevant as an admission; but it will have no binding effect unless, being admitted, or denied and found in favour of the person alleging it, it form the basis of judicial decision. Matter not put in question by the parties in the first suit and not necessary to the adjudication of the subject-matter of that suit, will of course be collateral, and any decision of the Court thereupon will be a mere *obiter dictum* and have no binding force whatever.[2]

' The Section enacts that no Court shall try any *suit or issue*, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction *in a former suit* between the same parties, &c. After the words "in a former suit," are we to understand "or in an issue in a former suit"—in other words, is matter decided in an issue in a former suit to be understood as decided in a former suit? The question may at first sight appear almost too plain to require an answer; but it may be argued that as the earlier portion of the section speaks of two things, a "suit" and an "issue," which would be unnecessary if the former includ-

[1] Take as an example a decree by consent in a suit amicable or otherwise—see *Allason* v. *Stark*, 9 A. and E. 255; and *Earl of Hopetown* v. *Ramsay*, 1 Bell's Appeal Cases, 69. See Section 375 of the Civil Procedure Code.

[2] If the Court decide a point put in question by the parties, but not necessary to the adjudication of the subject-matter of the suit, will the decision on this point be binding? It might be said that such a point was not directly and substantially in issue. It was not *material* certainly—see Com. Dig. and other authorities cited, 2 S. L. C. 7th ed. 783, 788.

ed the latter, it cannot be supposed that the former standing alone in the subsequent portion of the section does include the latter. It could scarcely be contended that "suit" and "issue" were meant to be synonymous, and that the word "or" merely couples two synonymes. The distinction between *matter decided in a former suit*, that is, which was the immediate subject-matter of such suit and the direct object of the decision, and *matter decided in an issue in a former suit*, such issue involving not the main question to be decided, but a question subordinate and auxiliary to the main question—will be best realized by examining some of the decided cases.

I shall take first cases illustrative of *matter decided in a former* suit, that is, which was the immediate subject-matter of such former suit and the direct object of the decision therein; and in some of these cases we will find the principle of the second Explanation—*viz.*, "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." In *Marriot* v. *Hampton* (7 T. R. 260; 2 Esp. 546; and 2 S. L. C. 405) the defendant had brought a previous action against plaintiff for goods sold. The plaintiff had paid for the goods and obtained the defendant's receipt; but, being unable to find it at the time and having no other proof of payment, he could not defend the action and had to pay the money again. He afterwards found the receipt and thereupon brought an action for money had and received, to recover back the amount of the sum so wrongfully enforced in payment. Lord Kenyon was of opinion that, as the money had been paid under legal process, it could not be recovered back again, and the plaintiff was nonsuited. An application to set aside the nonsuit and grant a new trial was refused. Lord Kenyon, C. J. said:—"If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person.....It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; they are as often refused; but this goes much further." Grose, J. said:—"It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence, J. remarked that the proposition that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment,

Matter decided in a former suit.

is too preposterous to be stated.[1] Here the matter directly and substantially in issue in the former suit was the question of payment, and on this question the former judgment was held to be conclusive.

A claimed certain land as *taufir* or excess of her *talúk*. She sued B to recover it as such, and her suit was dismissed. She brought a second suit to recover possession of the same land alleging it to be an integral portion of her *talúk*, but the plea of *res judicata* was held to be good. Phear, J. said, "It is true that the title to possession on which the plaintiff now relies is different from that which she set up in the suit in 1854. In the present suit, she claims the land as being part of her *talúk*, while in 1854 she maintained that this land was *taufir*, which she had reclaimed and occupied as proprietor of the *talúk*, and on that account was entitled, as against the defendants, to have settled with her by Government. But I think the difference in the title put forward does not change the cause of action within the meaning of Section 2 of Act VIII of 1859. The plaintiff's cause of action, that which obliges her to seek the aid of a Court of Justice, is simply this, namely, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain land which she is entitled to have. It is

[1] The case of *Marriot* v. *Hampton* is usually cited as establishing the principle that *money paid under compulsion of law cannot be recovered back as money had and received*; and it is for this purpose used by the learned author of the Leading Cases. It also however illustrates and establishes the principle of *res judicata*. The proposition that money paid under compulsion of law cannot be recovered back must be received with some modification, at least in India. In *Shama Persad*, &c. v. *Haro Persad*, &c. (10 Moo. In. Ap. 203) the Lords of the Privy Council said:—"There is no doubt that, according to the law of England—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action, whilst the decree or judgment under which it was recovered remains in force. But this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree, or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded; and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases, is whether the decree or judgment under which the money was originally recovered, has been reversed or superseded." These remarks were quoted in the recent case of *Kali Charan Dutt*, &c. v. *Jogesh Chandra Dutt* (decided 12th September 1877) and were applied by a majority of a Full Bench of the Calcutta High Court to the following facts. A sued B in 1859 to enhance the rent of certain property held by the latter as tenant under the former. B claimed to hold at a permanent fixed rent of Rs. 461. The Court of first instance gave A a decree enhancing the rent to Rs. 2,417. This decree was affirmed on appeal by the District Judge in 1864, and by the High Court in 1865; but was reversed in 1873 by the Privy Council, who held that the old rent could not legally be enhanced. Meanwhile, between 1865 and 1873, A brought sixteen suits (twelve under Act X of 1859, and four under Act VIII (B. C., of 1869) against B for arrears of rent at the enhanced rate; and, having

for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title or her real title, so much the worse for her. The adjudication in the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported (*Umatara Debya* v. *Krishna Kaminí Dasí and others*, 2 B. L. R. A. C. 102; S. C, 10 W. R. 426). This decision was confirmed by the Privy Council, their Lordships entirely concurring with the judgment delivered by Phear, J. in the High Court (see 11 B. L. R. 170). In *Muthumadeva Naik* v. *Sevathamuthumadeva Naik* (7 Mad. H. C. Rep. 160) the plaintiff, alleging a custom of primogeniture, and that he was the eldest son of the late owner, sued to recover possession of certain property. He was held to be barred by a previous judgment against him in a former suit brought by him to obtain a declaration of his status as the son of his father's *Pattába Stri*, or royal wife, and consequently entitled to inherit the zamindarí on his father's death to the exclusion of the defendant's mother and her children. "The *caussa* in

obtained decrees, realized the amounts decreed. After the decision of the Privy Council, B brought a suit to recover back Rs. 8,561, the difference between the old and the enhanced rent realized by A in these sixteen suits. Three Judges out of five held that he was entitled to recover. The result is no doubt satisfactory, as it is not reasonable that A should retain this money to which the event showed that he had no right: but it is difficult to reconcile the decision with either of the two principles stated in the beginning of this Note. The observations of the Privy Council may reasonably be argued not to apply, as the rent decrees remained unreversed; and on the principle of *res judicata*, while these decrees were unreversed, it is difficult to understand how their immediate subject-matter could be removed from their operation. It may however be regarded as a case of an *estoppel against an estoppel*, which, said Lord Coke, "setteth the matter at large." B was estopped by a decree then unreversed from saying that at the date of each of the sixteen decrees his rent was not Rs. 2,417; and A was estopped by the Privy Council decree from saying, when the suit to recover Rs. 8,561 was brought, that B's rent was not Rs. 461. But the case in truth falls within the principle of the following passage, (p. 574. of Mr. Daniell's Chancery Practice, 5th ed.):—"Although a final judgment of a Court of competent jurisdiction, whether in this or any other country, will operate as a bar to a claim for the same matter in a Court of Equity, yet, if from any circumstance, such as fraud, mistake or surprise, it is against conscience that the defendant should avail himself of such a bar, a Court of Equity will interfere to set it aside."—See the cases quoted in the Note. It may be observed that the cases by which the rule of *res judicata* has been moulded in England are mostly common law cases; and the rule, as so formed, naturally partakes of the rigidity of the common law. Courts in India are bound to administer justice, equity, and good conscience; and the strict common law rule may not therefore be sufficiently elastic to suit all cases that come before them. The section of the Code of Civil Procedure does not contemplate the equitable principle embodied in the above passage; and there may be in consequence a certain difficulty when it has to be applied to cases analogous to *Kalicharan Dutt, &c.* v. *Jogesh Chandra Dutt*. See some strong remarks upon the case of *Marriot* v. *Hampton* at p. 295 of Phillimore's *Principles and Maxims of Jurisprudence*.

the first suit," it was observed, was "being heir," and Paulus does not say that a new suit for the same subject-matter may be brought because a new basis in fact of the same *caussa* is adduced, but where there is a different *caussa*. The present case seem to fall within his words *mutatam actionem opinio petitoris non facit*."[1] In *Janaki Ammál* v. *Kamalathammal* (7 Mad. H. C. Rep. 263) A had sued as owner by a right of inheritance to recover the property of her deceased husband, and B had unsuccessfully resisted, setting up a *preferable right to inherit*. B then brought a suit to recover half the same property *on the basis of a family agreement*; but she was held barred by the previous proceedings. In *Kashi Kissore Rai Chaudhri*, &c. v. *Kristo Chandra Sandyal Chaudhri* (22 W. R. 464) the plaintiff sued for a declaration of his right to a certain *chur* on the ground that it was an accretion to his mauzah A; and it was held that his suit was barred by a judgment in a former suit in which he had unsuccessfully sued for the same *chur* on the ground that it was an accretion to his mouzah B.[2] In *Denobandhú Chaudhrí* v. *Kristomani Dasi*[3] (I. L. R. 2 Calc. 152) the facts were these:—A and his wife B had a daughter C, who was married to D. After the death of C and the subsequent death of A, B sued D for the recovery of certain property which she alleged

[1] "The Exceptio *rei judicatæ* bars every claim which may be adverse to the matter of the judgment *quotiens inter easdem personas eadem questio revocatur*. In respect to the requisites for the identity of a legal contention, two things are needed—1, The Exceptio falls to the ground when no indentity exists, even though the subsequent action may resemble the former one. 2, The Exceptio is maintainable where the indentity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. In Personal Actions identity of right results from similarity of origin; but in Real Rights and in Real Actions, the mode of origin is immaterial. For example, a suitor has instituted the *Hereditatis petitio* and has been non-suited, upon which he proceeds by the *Rei vindicatio* for certain definite things. In this case the Exceptio *rei judicatæ* comes into operation. Thus the distinction between the whole and part is irrelevant."—Tomkins and Jenken's Roman Law, p. 95. In order that the *exceptio rei judicatæ* might be successful, there must, as a general rule, have been in the former action, the same thing as the subject-matter of the litigation, the same quantity, the same right, the same ground of action, the same persons suing in the same character. *Cum quæritur hæc exceptio noceat necne, inspiciendum est an idem corpus sit; quantitas eadem; idem jus; an eadem causa petendi, eadem conditio personarum; quæ nisi omnia concurrant, alia res est* (Dig xlix. 2, 12 § 14). The French Code adopts the same rule (*Cod.* 1351), In *Hunter* v. *Stewart* (31 L. J. Eg. 347) Lord Westbury translated *eadem causa petendi* by "the same ground of claim, or one and the same case for relief."

[2] Reference was here made to the judgment of Holloway, J. (at 3 Mad. H. C. Rep. 32), and to the principle of Roman Law there stated, *viz.*, that the identity of the question is not destroyed by the origin of the right being different—See Savigny 6 412, and note, *suprá*.

[3] This cases decided by a Full Bench is important, inasmuch as the exact effect of the Privy Council decision in *Umatara Debya* v *Unnapurna Dasi* was discussed.

that D held under pretence of a deed of gift from A to C, such deed of gift being in reality a forgery. The deed of gift was found to be genuine and B failed, whereupon she brought a second suit to recover the same property by virtue of her right as heiress to her daughter C; but it was decided by four out of the five Judges composing the Full Bench, that she was concluded by the previous judgment.[1] In *Devrâv Krishna* v. *Halambhai*, &c. (I. L. R. 1 Bom. 87) the plaintiff had sued the defendants as *principals* to recover damages for the non-delivery of firewood. They pleaded that they had acted merely as the plaintiff's agents, and had not themselves contracted to deliver the firewood. This plea succeeded and the suit failed. It was held that the plaintiff could not again sue to make them liable as his responsible agents under a trade usage.[2]

So far as Explanation II is concerned, the preceding cases furnish illustrations of matter that might and ought to have been made ground of *attack* in the former suit. As to matter that might and ought to have been made ground of *defence*, Lord Westbury said in *Srimut Rájá Múttú Vijaya Raganadha Bodha Gúrú Swamy Periya Odaya Tever* v. *Kalama Natchiar*, &c. (11 Moo. In. Ap. 50):—"When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward."[3] In *Baldeo Sahai* v. *Bateshar Singh*, &c. (I. L.

[1] With this case may be compared *Mussamat Nausha Begum*, &c. v. *Mussamat Amrao Begum*, &c. (7 N. W. P. Rep. 60). The plaintiff had brought a previous suit to obtain a one-fifth share of her deceased husband's estate as legatee under an alleged will, and failed because the will was held invalid. She then sued to recover three-forty-eighths of the same estate relying upon her title as heiress. A Full Bench of five Judges unanimously held her not barred by the previous judgment. *Hunter* v. *Stewart* was referred to. The judgments are very brief, and the facts are not very fully stated. Some of the Judges thought that the case would have been different, if instead of suing for a legacy under the will, the plaintiff had brought her previous suit for the administration of her husband's estate. Why the will was found *invalid* does not appear from the report.

[2] The following cases furnish other states of facts under which plaintiffs were held barred from bringing a second suit.—*Premanand Gosami* v. *Ram Charan Deb*, &c. 20 W. R. 482: *Srikisto Biswas* v. *Jai Kisto Biswas*, 24 W. R. 304.

[3] The appellant in this case might have insisted on the validity of an instrument somewhat in the nature of a will; but, instead of doing so he relied upon a title based upon other grounds, and when his appeal came on to be heard before the Privy Council, he in effect disclaimed all title under this instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. Having lost that case, he subsequently brought a suit to recover the same property relying upon the same instrument as a valid will and testament. The Privy Council said:—"There would be an end to all security in the administration of justice, if the course now taken by the appellant of setting up the will were allowed. On every ground, therefore,—*first*, on the ground that the thing was in issue, and that what was in issue must be taken to have been decided by

R. 1 All. 75) the defendants, having purchased an estate in the plaintiff's possession, sued him to recover possession of it. The plaintiff resisted the suit merely on the ground that he was the auction-purchaser of it, and defendants obtained a decree, whereupon the plaintiff brought a suit to recover the property on the ground of a right of pre-emption in respect thereof. It was held that he was barred by the former judgment, as he might have set up this right in answer to the previous suit.[1] A and B were brothers. After their father's death, A sued B for a moiety of the family property, movable and immovable, valued at Rs. 12,000. He admitted being in possession of about Rs. 1,000, and claimed property or damages to the amount of Rs. 5,000 more, in order to complete his share. He obtained however a decree for merely half a share in a house and shop, worth about Rs. 700, the rest of his claim being rejected. B subsequently brought a suit against A to obtain a moiety of the property which A had in the previous suit admitted to be in his possession, and of other property alleged to have been fraudulently concealed. It was held that this suit would not lie, as, if A had in the former suit claimed more than he was entitled to, B might have urged that fact as a ground of defence (*Maktum Valad Mohidin* v. *Imam Valad Mohidin*, 10 Bom H. C. Rep. 293). Further instances of the application of the principle will be found in *Mussamat Wafia* v. *Mussamat Sahiba*, 8 W. R. 307: and *Nafar Chandra Paul Chaudhri* v. *Lakhi Mani Debya*, &c. 9 W. R. 300.

In the majority, if not all, of the preceding cases the matter directly and substantially in issue in the second suit had been decided in the former suit, had been or might and ought to have been made the main subject of controversy in the previous litigation. I now turn to those cases in which the matter directly and substantially in issue in the second suit was decided in an issue in a former suit.

Matter decided in an issue in a former suit.

In *Outram* v. *Morewood* (3 East, 346) the plaintiff declared against Morewood and Ellen his wife in trespass for breaking and entering a certain close

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the judgment; *secondly*, upon the personal ground that the appellant having used this document and abandoned all right to it as a will cannot now use it for a different purpose—we are of opinion that there is no doubt as to the correctness of the determination of the Court below," which dismissed the suit. The waiving or abandoning of a ground of defence is a stronger case than the omission to put it forward at all. This waiving or abandoning a ground of attack or defence was also made a basis of the decision in the cases antecedently quoted and which are to be found at 7 Mad. H. C. Rep. 160, 263; and 11 B. L. R. 169.

1 See also *Jadu Lal* v. *Ram Gholam*, &c. I. L. R. 1 All. 326.

and digging coal there. To this declaration the plea was a title derived by the defendant Ellen from certain persons to whom this and other coal mines had been bargained and sold by one Sir John Zouch. Morewood derived his title from his wife Ellen. She had been sued by the plaintiff in trespass for breaking and entering the same identical coal mine and had pleaded the above title, averring that the coal in the declaration in that action was part of the coal so bargained and sold. This averment had been traversed and issue found on the traverse. This issue had been found for the plaintiff, and judgment had followed thereupon. "The question," said Ellenborough, C. J. "is whether the defendants, the husband and wife, are estopped by this verdict and judgment from averring contrary to the title there found against the wife, that the coal mines now in question are parcel of the coal mines bargained and sold," as alleged: and the decision of the Court was that they were estopped. His Lordship commented upon the authorities relied upon as sustaining the contrary doctrine, and showed that none of them negatived the conclusiveness of a verdict found on any precise point once put in issue between the same parties. Referring to this case, Vice-Chancellor Knight Bruce made the following observations in *Barrs* v. *Jackson*: [1]—"Lord Ellenborough certainly, and the Court of King's Bench, in *Outram* v. *Morewood*, decided most accurately with reference to the pleadings in that action at common law, that an allegation on record, upon which issue has been once taken and found, is between the parties taking it conclusive according to the finding thereof so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram* v. *Morewood* raised *as to the same property and for the same purpose* the same issue as was raised and tried in the action, the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English Courts of Common law and those of other Courts of justice. But it is, I think, to be collected that the rule against reagitating matter adjudicated is subject generally to this restriction —that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties.

[1] 1 *Younge* and *Collyer's* Chancery Cases 585. The above passage has been often quoted, but the Vice-Chancellor's judgment was reversed in appeal by Lord Chancellor Lyndhurst (1 Phil. 582).

and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate object of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority." The learned Vice-Chancellor put numerous instances to show the injustice and absurdity that would in his opinion result from holding decisions on facts in proceedings between parties to be conclusive on those parties for all purposes, and finally expressed his opinion that the judgment neither of a concurrent nor of an exclusive jurisdiction is conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, and that a judgment is final only for its proper purpose and object.[1] In *Boileau* v. *Rutlin* (2 Exchcq. 665) Parke, B. assumed that material facts actually decided by an issue in a suit or admitted either directly or indirectly by taking a traverse on some other facts, which traverse is found against the party making it, cannot be again litigated between the same parties. This view agrees with the ruling of Lord Ellenborough in *Outram* v. *Morewood*. Vice-Chancellor Knight Bruce however limits the conclusiveness of the decision upon the point determined by the finding on the issue in the previous suit to cases in which the same issue is raised as to the same property or subject-matter and for the same purpose: and he thinks that the point may be re-opened between the parties if it comes in question as to another property or subject-matter and for another purpose. It is not within the scope of this work to examine how far this view is correct upon the English authorities. It may however be observed that the particular judgment in which it was enunciated was reversed on appeal; and, so far as I am aware, the same view has not been since laid down by authority. In examining the Indian cases concerned with *matter decided in an issue in a former suit* it will be important to see how far they support this view.[2] C, claiming to

1 The above view is in accordance with the Roman Civil Law upon which the learned Vice-Chancellor to a considerable extent based his conclusion.

2 If the matter were directly and substantially put in question between the parties, it is not absolutely necessary that an issue would have been framed in so many words. In *Serjamani Dayi* v. *Sudanand Mohapatter* (12 B. L. R. 304; S. C. 20 W. R. 377) A, a Hindu subject to the Mitakshara law, had adopted B and afterwards C. A then made a will dividing the whole of his property between his adopted sons B and C, but providing that, if either of them disputed the will, he was to forfeit his share, and the whole estate was to go to the other son. B was subsequently disowned by A. and declared to have forfeited his rights under the will. On this, B brought a suit against A, C and certain persons claiming portions of the property under deeds executed by A, for the purpose of setting aside these

be the adopted son of A, brought an action against certain *patnidars*, who had obtained *patni* leases from B the widow of A, in order to have these leases set aside on the ground that B, having only a widow's estate, had no power to grant them. D intervened in that suit, alleging that he was the heir of A, and was therefore entitled to dispute C's alleged adoption. An issue as to the alleged adoption was therefore raised and tried and decided in favour of C. The decision was confirmed on appeal. The question as to the validity of the *patni* leases was decided by the Court of first instance in favour of the *patnidars*, and no appeal was preferred. Subsequently D, claiming to be heir to A, brought a suit to set aside the adoption of C; but it was held that this suit was barred by reason of the judgment in the former one. The Privy Council said:—"By the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the *status* of one of them in relation to the other, it cannot, in the opinion of their Lordships, be again tried in another suit between them" (*Krishna Behari Rai* v. *Brajeswari Chaudhrani* L. R. 2 I. A. 283; S. C. I. L. R. 1 Calc. 144; and in the High Court, 19 W. R. 63). A took a *patni* lease of certain villages from B in 1861. In 1865 she was evicted from a portion of this property, but at that time took no steps to obtain abatement of the annual rent. Not having paid the rent for 1871, she was sued by B for the rent of that one year. In this suit she claimed by way of defence an abatement of Rs. 155 as representing the annual value of the property which she had lost by the eviction. The issue so raised was tried, and it was decided that the abatement to which she was entitled

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deeds, the will and the adoption of C; for maintenance and for a declaration that his father's repudiation of him was illegal. The result of the final decision in this suit on appeal was that the adoption of C and the disinherison of B were declared invalid, and the will was set aside in so far as it professed to deprive B of his right to succeed to the ancestral immovable property; but A was declared entitled to do as he liked with the rest of the property. The judgment declared that "ancestral property" included only that actually inherited from ancestors and not that which had been *acquired from the income of the ancestral property*. After the death of A and C, B brought another suit against C's widow and others for possession of the whole of A's estate, real and personal. This suit was dismissed as to the self-acquired realty and all the personalty self-acquired and ancestral, but decreed as to the ancestral immovable property actually inherited from ancestors as well as *that acquired from the income thereof*. This latter judgment therefore gave to B the acquisitions from the income of the ancestral property, which the first judgment in effect decided that A was entitled to devise. The Privy Council on appeal reversed the judgment of the High Court as to these acquisitions, holding that, although no exact issue had been framed on the question whether A had the power to devise by will such real property as he had acquired out of the income of the ancestral property, yet the pleadings and arguments showed that the parties had invoked the opinion of the Court thereupon, and that it had therefore been decided in a manner binding upon them.

was Rs. 42. This decision was not appealed and therefore became final. A then brought a suit against B for the purpose of obtaining a permanent abatement of Rs. 155. It was held that the question of abatement was *res judicata* and could not be re-opened (*Nabo Dúrga Dasí*, &c. v. *Feiz Baksh Chaudhri*, I. L. R. 1 Calc. 202). This is a strong case. The subject-matter of the first suit was only a single year's rent, and yet the decision upon the issue as to abatement was held to have a permanent binding effect. Quite analogous to this case is that of *Rukhal Das Singh*, &c. v. *Srimati Hiramati Dasi*, &c. (22 W. R. 232) in which the amount of *jama* or annual rent was the question tried in the first suit, which was brought to recover arrears of rent of specific years. In *Mohima Chandra Mazimdar*, &c. v. *Asradha Dasi* (15 B. L. R. 251 note) the first suit was also brought for rent. It was pleaded that the land was *lakheraj*, and an issue was raised upon this point and decided in favour of the plaintiff landlord. This decision was held to have a binding effect between the parties. See also *Mahesh Chandra Bandopadhya* v. *Jaikissen Mukherji*, 15 B. L. R. 248 note.[1] A contracted with B to supply straw for twelve months, the supplies to be sent daily. A failed to supply the straw. On the 12th March B sued him for damages for the default committed up to that date. The contract was denied, but was held to have been proved. A subsequent suit was brought to recover damages for default to deliver between the 17th April and the 16th June. It was held that the second suit was not barred, the contract being a continuing one; but that the *factum* of the contract was *res judicata* (*Cook and others* v. *Jadab Chandra Nandi*, 2 B. L. R. O. J. 48). These cases seem to establish conclusively that the above view taken by Vice-Chancellor Knight Bruce in *Barrs* v. *Jackson* has no application in India, but that the decision of a question fairly put in issue, tried and determined in a suit for one purpose will be binding upon the same parties in another suit even though brought for a different purpose. The whole question was considered by the Supreme Court of the United States in the recent case *Cromwell*

[1] Owing to the difference between the systems of pleading in England and India the use of the term "issue" may not be exactly the same in English and Indian cases. The learned Vice-Chancellor, who decided *Barrs* v. *Jackson*, gave his opinion with advertence to the English system, which moreover was not the same in the former Courts of Common law and Courts of Equity. As to the latter, see the remarks of Holloway, J. upon *Hunter* v. *Stewart* in his judgment in the case of the Shivaganga Zamindari reproduced at 11 Moo. Ind. Ap. 64. According to the new Code of Civil Procedure (s. 146), issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue. Each material proposition affirmed by one party and denied by the other must form the subject of a distinct issue. Issues are of two kinds—*(a)* issues of fact; *(b)* issues of law.

v. *County of Sac*,[1] the judgment in which contains the most lucid and exact statement of the rule which I have been able to find. The facts were as follow. The County of Sac by a vote of its people authorized the issue of bonds to the amount of ten thousand dollars for the erection of a Court-house. Bonds to this amount were issued by the County Judge and were delivered to one M, with whom he made a contract for the erection of a Court-house. The contractor, M, on receipt of the bonds gave one of them as a gratuity to the County Judge. The Court-house was never constructed by M or by any other person. One Smith had become before their maturity the holder of twenty-five coupons, which had been attached to the bonds; and he brought an action to recover the amount of these coupons. The final judgment in that case decided that the bonds were void as against the County in the hands of parties who did not acquire them before maturity and give value for them: that the plaintiff, not having proved that he gave such value, was not entitled to recover: that whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds, affected equally the coupons for interest attached to them. Subsequently another action was brought by one Cromwell on four of the bonds, each for one thousand dollars, and four coupons for interest attached to them, each for one hundred dollars. It was shown that Cromwell was the real owner of the coupons in the former action and that such action was prosecuted for his sole use and benefit: and it was contended that the judgment was a bar to the second action. It was held however that, although the finding and judgment upon the invalidity of the bonds as against the County must be held to estop the plaintiff from averring to the contrary, yet as bonds were negotiable instruments and their issue authorized by due authority, they would be valid obligations in the hands of a *bonâ fide* holder taking them for value before maturity—that, if the plaintiff received the bonds and coupons, which formed the subject of the second suit before maturity for value, as he offered to prove, he should have been permitted to show that fact—that there was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case, which could preclude him from making such proof in the second case, for the fact of a party not having shown that he gave value for one bond or coupon was not even presumptive,

American Case of *Cromwell* v. *County of Sac.*

[1] Decided in March, 1877. I take the above report from the *London Law Times* of the 14th July, 1877, which reprints it from the *American Law Times*. The American Law Reports are not to be had in India.

much less conclusive evidence that he may not have given value for another and different bond or coupon. Field, J. who delivered the opinion of the Supreme Court, said:—" In considering the operation of the previous judgment, it should be borne in mind, as stated by counsel 'that there is a *difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action.* In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered for that purpose.*[1] Thus for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is *strictly accurate when applied to the demand or claim in controversy.* Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. *But where the second action between the same parties is upon a different claim or demand,* the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.[2] In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and deter-

[1] This is embodied in Explanation II of the Section of the Civil Procedure Code.

[2] Explanation II applies apparently to *matter decided in a former suit* only, not to *matter decided in an issue in a former suit.*

mined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram* v. *Morewood* (3 East, 346), the defendants were held estopped from averring title to a mine in an action of trespass for digging out coal from it, because in a previous action for a similar trespass they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said:—'It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' .....

.....

...On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. *A judgment by default only* admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding (*Boileau* v. *Rutlin*, 2 Ex. 665, 681, and *Hughes* v. *Alexander*, 5 Duer 493). The case of *Howlett* v. *Tarte* (10 C. B. N. S. 813) supports this view. That was an action for rent under a building agreement. The defendant pleaded a subsequent agreement changing the tenancy into one from year to

year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer the replication, after full argument, was held bad. In deciding the case Willes, J. said:—'It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time to go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action....I think we should do wrong to favour the introduction of this new device in the law.' Byles, J. said:—'It is plain that there is no authority for saying that the defendant is precluded from setting up this defence.' Keating, J. said:—'This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant.' The language of the Vice-Chancellor in the case of *Henderson* v. *Henderson* (3 Hare, 100, 115) is sometimes cited as expressing a different opinion, but upon examining the facts of that case it will appear that the language used in no respect conflicts with the doctrine we have stated. In that case a bill had been filed in the Supreme Court of Newfoundland by the next of kin of an intestate against A and others for an account of estate and of certain partnership transactions. A decree was rendered against A upon which the next of kin brought actions in England. A then filed a bill there against a next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him and alleging various errors and irregularities in the proceedings in the Supreme Court of the island, and praying that the estate of the intestate might be administered, the partnership accounts taken, and the amount of the debt due to him ascertained and paid. A demurrer to the bill was allowed for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before that Court. It was with reference to the necessity of having the subject of particular litigation as a whole at once before the Court and not by piecemeal, that the Vice-Chancellor said:—'In trying this question, I believe I state the rule of Court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires

the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to *open the same subject of litigation* in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' There is nothing in this language applied to the facts of the case, which gives support to the doctrine that whenever in one action a party might have brought forward a particular ground of recovery of defence, and neglected to do so, he is in a subsequent suit between the same parties upon a *different cause of action* precluded from availing himself of such ground."

Matter of first and second suit not identical.

It may now be useful to notice some cases in which the matter of the second suit, though apparently the same, was held not to be identical with that decided in the first suit. A alleged that he had purchased a certain property from B. Three and a half kanees of land, part of this property, were attached in execution of a decree, as belonging to B. A objected to the attachment, but his objection was overruled, and the three and a half kanees were sold and purchased by C. Upon this, A brought a suit against C to have it declared that these three and a half kanees belonged to him: and to this suit he made B a co-defendant. This suit was dismissed on the ground that A was holding *benami* for B. Subsequently C bought from B the rest of the talúk and brought a suit against her to obtain possession. The three and half kanees were not included in this suit. A came in and got himself made a party, and it was held that he was not estopped by the judgment in the former suit, there having been no dispute in that suit between A and C, or between A and B as to the property other than the three and a half kanees. As to this remaining portion there could not have been any dispute in the former suit between A and C, for the latter had not then acquired his title; and as between A and B (C's alleged assignor) the record of the former suit did not show any matter alleged by the one and denied or confessed by the other (*Ram Chandra* v. *Kashi Mohan*, 21 W. R. 57). A brought a suit against B to recover possession of certain property pledged to the latter under a *zur-i-peshgí* lease. He obtained a decree which

declared him entitled to possession on depositing Rs. 4,824, the amount found to be still due on the mortgage. He did not deposit this money; but, four years after, he applied to execute the decree, alleging that the amount had been paid off by the usufruct of the property since the date of the decree. This application was refused, the Court declining to enter upon the necessary inquiry. A then brought a suit to recover possession of the property upon the ground that the mortgage debt was discharged from the usufruct. It was held that this suit was not barred by the judgment in the former suit, for the matter which the Court had to determine in the second suit, *viz.* the result of the accounts at a period subsequent to the first suit, was a matter which had arisen and come into being since the matter of such first suit had been heard and determined (*Rai Dinkur Dayal*, &c. v. *Sheo Ghulam Singh*, &c. 22 W. R. 172).[1] Certain property was attached in execution of a decree. A objected to the attachment on the ground that he was in possession under a deed of mortgage and conditional sale, which had become absolute. His objection was disallowed and the property was sold and purchased by B. On this A brought a suit against B and the decreeholder to establish his right. This suit was dismissed on the ground that A had not established the mortgage and conditional sale. The document, which was evidence of this transaction, was inadmissible because it was unstamped. It was also held that A had failed to prove a title based on thirty years' possession as owner. B was however unable to obtain possession; and, in consequence, he brought a suit to eject A. This suit failed, the High Court holding that A had been more than twelve years in possession, which was sufficient to raise a bar to B's suit according to the provisions of the Limitation Act. Subsequently B's sons brought a suit against A's son to redeem the mortgage which A had made the basis and limit of his rights. It was contended that this suit was barred by the former judgment, as A had from the first asserted the mortgage as the foundation of his right, and B being thus fully apprized

[1] In connection with this case may be noticed a point upon which the Calcutta and Allahabad High Courts are in conflict. The latter Court holds that when a redemption suit is dismissed on the ground that the mortgage debt has not been satisfied from the usufruct up to date, it should deal with the accounts and determine the exact sum unpaid, and that its decision on this point will be final between the parties, 8 N.-W.-P. Rep. 112; 9 N. W.-P. Rep. 388. The Calcutta Court on the other hand refused to allow a mortgagee to appeal against the finding of the Court of first instance as to the amount due, holding that, the redemption suit having been dismissed, he would not be bound by this finding in a subsequent suit (*Brijolal Upadhya*, &c v. *Moti Sundari*, &c. Sp. No. W R. 33; S. C. Marsh. 112).

of this, was bound to bring forward in the former suit every circumstance by which his own claim to possession could be supported and of which he was at the time aware. The Bombay High Court however held that the suit was not barred. West, J. said :—"The principle of *res judicata*, simple enough in its statement, is one that seems to present considerable difficulty in its application. We have been referred to a great number of decisions of the High Courts, which it would be hard, perhaps impossible, to reconcile in all respects with each other. The principal variances have arisen from different views of what did not or did constitute, for the purposes of a second suit, a ground of right identical with the one relied on in a previous suit between the same parties. In the case of *Dadsar Bibi* v. *Shakir Barkandaz and others*, Bayley and Mitter, J. J. ruled that, after suing as a donee, the plaintiff could not sue again for the same property as heir. His whole title, whatever it might be, ought, those learned Judges thought, to have been brought forward at once. The same view is taken in *Brajo Lal Rai* v. *Kheternath Meitro ;* and that all the grounds of suit must be brought forward at once is repeated in *Premanand Goswami* v. *Ram Charan Deb and another*. On the other hand, Lord Westbury's *dictum* in *Hunter* v. *Stewart*, that knowledge of a second ground of right, when a first one is relied on in a suit, does not prevent that second ground being afterwards made the basis of a second suit seeking the same relief as the first, has been fully adopted by this Court in *Bhisto* v. *Ramchandra*, and has been recognized in other cases. In the case of *Umatára Debya* v. *Unrapúrna Dasi*" (see *ante* p. 226) "the Privy Council may at first sight seem to have departed from the principle enunciated by Lord Westbury, but there the whole cause of action was considered as having arisen out of the decision of the Revenue Authorities. The transaction between the parties had been such as for judicial purposes should properly be regarded as one, and on that one transaction several suits between the same parties could not proceed. As is said by Cleasby, B. in *Death* v. *Harrison*, 'though the particular claim.....was not in controversy' (in the previous suit), 'the subject-matter out of which it arose was,' and in such circumstances the allowance of repeated suits would lead to vexatious litigation. In the case of *Stevens* v. *Tillett*, Willes J. says, that 'matter in respect of which no evidence was given on the former occasion may be inquired into' and the matter must be regarded as essentially different when it did not originate in the same transaction, and when it constitutes, as averred, a wholly different right in the plaintiff giving rise to a different duty on the part of the

defendant. In Special Appeal 488 of 1873 it is said, that a plaintiff, suing for ejectment cannot in that suit obtain a decree for redemption of a mortgage of which he had notice when he filed his suit, but it is not said that he is debarred from enforcing redemption in another suit. The relative rights and duties of owner and trespasser on the one hand, and of mortgagor and mortgagee on the other, are wholly different, and failure in a suit of simple ejectment does not in our opinion in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor" (*Shridhar Vinayak* v. *Narayan Bábaji*, &c., 11 Bom. H. C. Rep. 228). In a former suit by the plaintiff against the defendant for rent, the latter denied the tenancy and the plaintiff's title to the land. The plaintiff thereupon sued him as a trespasser in the Civil Court for possession and *mesne* profits. The failure of the suit for rent was held to be no bar to the recovery of *mesne* profits (*Dataram* v. *Ram Krishto and others*, 9 W. R. 594; *Kadír Baksh and another* v. *Golam Ali Comashta*, 9 W. R. 90). A suit to recover enhanced rent after service of notice was held to be no bar to a second suit brought after the failure of the first to recover arrears of rent for the same year at the former rate (*Khedaranisa Bibí and others* v. *Búdhí Bibi and others*, 13 W. R. 317). A Hindú sued to establish his right to a half share in certain ancestral property, and in the schedule attached to his plaint he stated that he was in possession of certain lands, a portion of the whole property. A decree was passed in his favour, which was appealed to the Privy Council. While this appeal was pending, he brought a second suit to recover possession of the lands, possession of which he had admitted in the schedule to his first plaint. He alleged that he had been forcibly dispossessed from these lands during the pendency of the first suit. The cause of action in each case was clearly different, and it was held that the principle of *res judicata* had no application (*Babú Gúrú Das Rai* v. *Babú Haronath Rai and others*, 7 W. R. Civ. Rul. 423). A suit to raise an attachment on a house, which failed, was held not to be a bar to a second suit against the purchaser in execution to recover possession of the same house (*Moro Balkrishno Mule* v. *Sheik Saheb Badúrudin Kamble*, 5 Bom. H. C. Rep. A. C. 199). In the case of *Babú Mohan Lal Bhya Gyal and another* v. *Lachman Lal* (5 B. L. R. 663), the facts were as follow:—A Hindú died leaving a sister, A, and a deceased sister's son, B. Upon A taking possession of the property, B brought an action against her, claiming to be the preferable heir. This action failed. A having died and having left an adopted son, C, B brought a second suit to obtain the property, alleging that C was not the

adopted son of A, and that he (B), who came within the class of *bandhús*, was entitled to succeed to the property, as there was no nearer heir alive. The plea of *res judicata* was held to have no application. "The cause of action in the second case," it was remarked, "was the retention of certain property, of which the defendant, by averment of his right of inheritance by adoption, prevented the plaintiff, as sister's son, from obtaining possession; and it was clearly stated in the plaint that this, the plaintiff's cause of action, arose on the death of A. In the former suit the present plaintiff sued A, alleging that she, as a childless Hindú widow, had no right to hold the property under the Hindú law."

Splitting claims.

In connection with the subject-matter of Explanation II may be read Section 43 of the Civil Procedure Code, which is as follows:—"Every suit shall include the whole of the claim arising out of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff omit to sue for, or intentionally relinquish, any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same claim may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted. *Illustration*—A lets a house to B at the yearly rent of Rs. 1,200. The rent for the whole of the years 1874 and 1875 is due and unpaid. A sues B only for the rent due for 1875. A shall not afterwards sue B for the rent due for 1874."[1] The case of *Grimbley* v. *Aykroyd* (1 Exch. 407; S. C. 12 Jur. 257) is usually cited to illustrate the principle contained in the first portion of this section. This case was decided upon the 63rd Section of the English County Court Act, 9 and 10 Vict. Cap. 95, which enacts that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the County Courts; but any plaintiff, having cause of action for more than the pecuniary limit of jurisdiction, may abandon the excess, and the judgment recovered shall be in full discharge of all demands

Omission to sue for one of several remedies.

[1] This corresponds with Section 7 of the former Code, Act VIII of 1859, which was as follows:—"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff *relinquish or omit* to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

in respect of such cause of action. The facts were as follow :—A railway contractor, the defendant, had given orders to a grocer, the plaintiff, to supply with goods the workmen engaged on the works. A separate action was brought for the supplies to each workman; but it was held that the demands could not be so split, and that the supplies to all the workmen should be included in a single suit; that "cause of action" means in general "cause of one action," and is not limited to an action on one separate contract. Pollock, C. B. said that the Judges were agreed that the section applied "to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand." It was elsewhere remarked of this case that there was one entire *prevenient* governing contract, of which the respective deliveries were merely the execution—the *overt* acts. In *Bonsey* v. *Wordsworth* (18 C. B. 325) it was held that a tradesman's bill for a series of articles delivered continuously cannot be split into different causes of action. Where more than one instalment of a promissory note were due, and one only was sued for, the judgment recovered in this suit was held to bar a further suit for the remaining instalments (*Mackintosh* v. *Gill*, 12 B. L. R. 37; S. C. 20 W. R. 358). A wrongfully dispossessed B and kept him out of possession during the years 1273, 1274, and 1275. B successfully sued to recover possession and also to obtain *mesne* profits for the years 1274 and 1275. Subsequently B brought another suit to obtain *mesne* profits for the year 1273. It was held that the cause of action in respect of the *mesne* profits of the three years was one and the same; that therefore the cause of action had been split and the second suit could not be maintained (*Rúkminí Koer*, &c. v. *Ram Tohal Rai*, &c. 21 W. R. 223). A alleged that he had obtained from B a *mukarrarí* tenure of a four anna share of a certain *mauza*. A tenant in this *mauza* deposited his rent in the Collectorate. A claimed Rs. 23 odd as his share of this rent, but the Collector refused to pay this amount to him, as B

1 Whether arrears of rent for successive years are several and distinct causes of action, in respect of which separate suits may be instituted, is a point on which the decisions were conflicting. In the case of *Rajá Sato Charan Ghosal* v. *Obhai Nand Dass* (2 W. R. Act X, Rul. 31) the question was decided in the affirmative : and this precedent was followed in *Ram Sunda Sen* v. *Kristo Chandra Gupta and others* (17 W. R. 380), and *Kristo Kinkur Poramanik*, &c. v. *Ram Dhun Chittanpia* (24 W. R. 326). There were, however, two authorities to the contrary, *viz.* *Rani Bhobo Sundari* v. *Bhagwan Chandra Mazimdar*, 3 R. J. and P. J. Act X, Rul. 14, and *Nawab Syud Ahmed Ali* v. *Mrs. E. M. Hay* Suth. S. C. C. Ref. 63. The question has now been set at rest by the *Illustration* to the above section.

denied his *mukarrarí* right. A then brought a suit against B and the tenant to recover Rs. 23 so claimed by him. Being unable to prove his *mukarrarí* title, he applied for and obtained permission to withdraw the suit with leave to sue again. He then brought another suit against B, asking for a declaration of his title, which he obtained, but not asking for the Rs. 23. He subsequently sued B for the Rs. 23: but it was decided that the cause of action was the same as in the previous suit, and that having omitted to claim the amount therein, he could not afterwards sue for it (*Lalla Lachman Sahai* v. *Ramsaru Pandyain, &c.* 20 W. R. 144).

In the case of *Abhiram Das* v. *Sriram Das and others* (3 B. L. R. 421) the plaintiff sued to recover certain property alienated by two Hindú widows, alleging that the surviving widow was unchaste and that the deed of alienation was fraudulent. He had before sued for the same property, alleging both widows to be dead and had failed. It was held that the second suit was not maintainable, Markby, J. observing:—"With regard to the fraud in the *kabala*, I think that was a matter which the plaintiff was bound to include in his former suit, for it would be distinctly splitting his cause of action if he was allowed to take that ground now for the first time. It will be observed that in this case, that which was made the cause of action in the second suit was in existence and might have been put forward, when the first suit was brought." It is in this respect to be distinguished from *Channú Lal Sahú* v. *Maná Lal and others* (5 B. L. R. 220). Here A and B were joint owners of certain property. In the execution of one decree the interest of A was sold and purchased by C. In the execution of another decree the interests of A and B were sold and purchased by D. In a suit by A to have the sale to C set aside, A succeeded in the lower Court, but on appeal a compromise was affected and the sale allowed to stand good. D relying upon his purchase, sued for possession of the shares of A and B, but obtained a decree for B's share only, *the Court remarking* that so long as the sale of A's share to C remained unreversed, D could not recover this share; D upon this brought a second suit to have that sale reversed, and it was held that this suit could be maintained. Markby, J. referring to the former case, said:—"In that case the plaintiff had, at the time when the suit was first brought, a complete title to recover the property he sued for, the only difference was a difference in the way that title was to be established. Here the decision, or order, by which the plaintiff's suit as to A's share was dismissed, was in effect that, so long as the defendant C held the sale-certificate, no other person could get a title to that property. It is to get rid of that very sale that the plaintiff brings

this suit." It does not appear very clearly from the published report, whether, when D brought his first suit, the decree of the lower Court reversing the sale in the suit between A and C was in force; or whether C was a party to D's first suit, or any issue was decided in that suit as between D and C.

Other cases in which no splitting of cause of action.

In the case of *Rao Kuran Singh* v. *Nawab Mahomed Fyaz Alí Khan* (14 Moo. In. Ap. 188) the plaintiff sued to set aside a mortgage granted by the widow and mother of a deceased Hindú. There had been a former case brought against various defendants to impeach certain alienations made by the same ladies, by which the inheritance subject to their interest was transferred to certain near relations so as to exclude the remoter heirs. It was contended that this section barred the second suit. The Privy Council were of opinion that the true test of the proper application of the section to any particular case must be whether there has been a spliting of the cause of action: and it is therefore necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action .....It appeared to their Lordships that the causes of action in the two cases were essentially different. In the one case the widows, assuming an absolute power of disposition had granted the inheritance in portions of the estate to the defendants in the first suit. In the other case the issue was whether they had duly exercised the limited power, which belongs to a Hindú female having a Hindú female's right of inheritance in the estate, of charging the estate for certain defined purposes. The cause of action in the two cases was therefore held to be distinct. A and B were co-sharers in joint property. In 1861 A sued B for partition (*i. e.* by metes and bounds, not mere division of the right), omitting to include in his claim a certain field which was then in the possession of a mortgagee. B subsequently redeemed this field and mortgaged it to C. A then brought a suit to recover his share of this field. It was held that there had been no splitting of the cause of action, for this field was not available for actual partition when the first suit was brought (*Narayan Bábáji Dábhalkar* v. *Pandurang Rámchandra Dábhalkar*, &c. 12 Bom. H. C. Rep. 148). The purchaser of certain land brought a suit to obtain and did obtain a decree declaring his title. He brought a subsequent suit to obtain possession. At the time of bringing the first suit he was out of possession and did not, up to the time of bringing the second suit, obtain possession. It was held that there was nothing to bar the second suit, as the cause of action put in suit on the former occasion

did not necessarily involve any breach of the contract to deliver possession, and a declaratory decree might have been obtained without entering on the question of possession (*Tulsí Ram, &c.* v. *Gangaram*, I. L. R. 1 All. 252). A suit was brought to recover accreted land. A second suit was subsequently brought to recover a further accretion which had taken place after the date of bringing the first suit. There was held to have been no splitting of the cause of action (*Pahalwan Singh* v. *Maharajah Mahasur Baksh Singh Bahadur*, 9 B. L. R. 169). A suit was withdrawn with permission to sue again, as a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint. A fresh suit was instituted, the portion so omitted being included. It was objected that, as this portion had been omitted in the former suit, it could not be claimed in the second suit; but the objection was rejected (*Ilahi Baksh, &c.* v. *Imam Baksh, &c.* I L. R. 1 All. 324.)

The second suit will be equally barred, whether the relinquishment of a portion of the claim in the former suit was a deliberate act or the result of accidental or involuntary omission (*Munshi Bazlúr Rahím* v. *Shamshúnissa Begam*, 8 W. R. P. C. 12, reversing the decision in Marsh. Rep. 286; *Ganesh Chandra Chaudhrí, &c.* v. *Ram Kumar Chaudhrí*, 3 B. L. R. A. C. 265). It is to be observed that the consequence of not suing for the whole of the claim is not that the suit cannot be entertained for so much as the plaintiff sues for, but that he cannot afterwards sue for what he has omitted (*Parsan Gopal Paul Chaudhrí, &c.* v. *Purnanand Mallick*, 21 W. R. 272, per Couch, C. J.)

Lands in respect of which there was one and the same cause of action were situated within the local jurisdictions of different Courts. A suit having been brought in respect of the land in one jurisdiction, and a subsequent suit in respect of the land in another jurisdiction, the latter was held not to be barred because sanction had not been obtained under Sections 11 and 12 of Act VIII of 1859 for the disposal of the whole claim by the Court in which the first suit was brought (*Takúr Persad* v. *Kalika Persad and others*, 2 N.-W.-P. Rep. 104). The Calcutta High Court decided directly the contrary in *Jamúna Dasi C haudhráni* v. *Bama Sundari Dasi Chaudhrani* (2 W. R. Civ. Rul. 149) where it was observed, that the effect of bringing two suits instead of one was to deprive the defendant of the right of appeal to the Privy Council, which she otherwise would have had: but see *Girish Chandra Mukherji* v. *Ramessuri Debi, &c.* 22 W. R. 308. Under the existing Code of Civil Procedure no sanction is required for the trial in any particular Court of a suit relating to immovable

property situate within the local jurisdictions of more Courts than one. Such a suit may be instituted in *any Court within whose jurisdiction any portion of the property is situate and otherwise competent* to try the entire claim (Section 19). The consequence, therefore, of splitting such a claim in future will be that a suit cannot afterwards be brought for the land omitted from the first plaint.

The widow of a deceased Muhammadan alienated different portions of her husband's property to different persons at different times and by distinct conveyances. The other heirs brought a suit against the widow and one alienee to set aside the alienation of one portion. On their bringing a second suit against the widow and another alienee to set aside the alienation of another portion, Section 7 of the former Code of Civil Procedure was pleaded; but it was decided that it did not apply. Although the plaintiffs sued under the same title, *viz.* by inheritance, in both cases, it was held that each alienation under the circumstances constituted a separate cause of action (*Mussamat Jahan Bibi* v. *Saivak Ram and others*, 1 N.-W.-P. Rep. Full Bench, 109). Having reference to Section 8 of the same Code, it may be observed that, although the widow was here a party to both suits, the cause of action in the first suit was *against the widow and one alienee*, and the cause of action in the second suit was *against the widow and another alienee*. Not being causes of action *against the same parties*, it might be contended that they could not be joined even under the permissive provisions of Section 8: and this seems to have been the ground of decision in *Sabir Khan* v. *Kali Dass Dey and others* (1 W. R. Civ. Rul. 199). Here A, B, C, and D were joint owners of a *talúk*. Default was made in payment of the rent of 1264 B. S. and the *talúk* was in consequence sold. A had not been registered as a sharer, and when he applied to the Collector for a share of the surplus sale proceeds, which remained after satisfying the arrear for which the sale was made, the Collector required him to establish his interest in these proceeds by a civil suit, and he accordingly brought a suit against B, C, and D for this purpose and obtained a decree for a two-anna share of the surplus sale proceeds. Besides the arrears of 1264 B. S. for which the *talúk* was sold, the *zemindar* held decrees for the rent of 1263 B. S., which were also satisfied out of the sale proceeds. A alleging that the rent on his share for 1263 had been paid, and that the arrears due by B, C, and D for that year had been satisfied out of the sale proceeds, brought a second suit to recover the amount, in proportion to his share, by which the available sale proceeds were diminished in consequence of the payment therefrom of the rents of 1263. It was contended that he

should have included this in his former claim ; and, not having done so, that he was barred by Section 7. A had, however, purchased his two-anna share in 1265 at a sale in execution of a decree. It was remarked that his remedy in the second suit might be not only against B, C, and D, but also against the former proprietor of the two-anna share, and also against the zemindar. The causes of action in the two suits not being, therefore, exactly *against the same parties*, the second suit was decided to be maintainable. See and distinguish *Tarini Persad Ghose* v. *Khudamani Debi* 5 B. L. R. 184, and 13 W. R. 261, in which the two suits were by the same plaintiff *against the same defendant*. In the case of *Vithú and others* v. *Narain Dábhalkar* (5 Bom. H. C. Rep. A. C. 30) a Hindú, whose share in an ancestral estate had been alienated by a co-proprietor to different persons, brought three suits simultaneously against the co-proprietor and the alienees to recover three distinct parcels of land. It was decided that, although the plaintiff had only one cause of action against the co-proprietor, and therefore ought to have brought one suit against him, including all the alienees therein, or brought separate actions against the alienees and caused the proceedings in these suits to be stayed till the suit against the co-proprietor was determined, yet, inasmuch as the suits as against the co-proprietor were instituted simultaneously, the error in splitting up the claim against him did not affect the merits or the jurisdiction of the Court. In *Pragji Rudarji* v. *Endarji Bhimbhai* (9 Bom. H. C. Rep. 257) the plaintiff sued his grandmother, A, and one, C, for some trees which he claimed by right of inheritance from his grandfather, but which A had sold to C. He had before sued A and B for a piece of land, which he claimed by the same right of inheritance, but which A had sold to B. The High Court held that the causes of action were different in the two suits, namely, the unlawful alienations by A of different properties. The Madras High Court took a different view. In *Sami Chetti* v. *Ammani Achy*, &c. (7 Mad. H. C. Rep. 260) the plaintiff's father had died seventeen years before, and his three widows had aliened the whole of the estate by degrees to twenty-eight different persons. Plaintiff brought one suit against the three widows and these twenty-eight persons. The District Judge dismissed it on the ground of misjoinder of persons and causes of action; but this dismissal was reversed by the High Court, Holloway, acting C. J. remarking :—"This suit has been dismissed upon the favourite ground of misjoinder. No practitioner of this Court would have thought of making the objection, as such suits are of daily occurrence. The Judge says that the cause of action against each of the purchasers is a distinct one. The plaintiff claims his

share of family property. His cause of action, the right, is his relation to the family to which the property appertains; and on this right, if established, and if he is not otherwise barred from recovering, he will be entitled to that share wherever found. The fact that various persons during his minority have affected to purchase parcels of the property does not destroy the unity of his ground of action. This view was followed in *Vasudeva Shanbhaga*, &c. v. *Kuleadi Narnapai*, &c., 7 Mad. H. C. Rep. 290; and *Cutti Udaiyan* v. *Canagappa Udaiyan*, &c., *id.* 292. Section 42 of the Code of Civil Procedure now enacts that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them: and Section 28 enacts that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

The result then of Sections 13 and 43 of the Code of Civil Procedure is that when one or more persons have a single cause of action agrinst one or more, the whole of the claim arising out of that cause of action must be included in a single suit. If the plaintiff, having omitted any portion, proceed to judgment and decree for the rest, he loses for ever his remedy in respect of the portion so omitted. Having thus considered on the one hand the *splitting of a single cause of action*, it may be useful, on the other hand, to make a few remarks about *joining several causes of action* in a single suit. With some few exceptions a plaintiff may unite in the same suit several causes of action, and any plaintiffs having causes of action against the same defendant or defendants may unite such causes of action in the same suit; but, if it appears to the Court that any such causes of action cannot be conveniently disposed of together, the Court may at any time before the first hearing, of its own motion, or on the application of the defendant, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof (Section 45 of the Code of Civil Procedure). The exceptions are that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, or to obtain declaration of title to immovable property, except (*a*) claims in respect of *mesne* profits or arrears of rent in respect of the property claimed: or (*b*) damages

Joining several causes of action in a single suit.

for breach of any contract under which the property, or any part of it, is held: or (*c*) claims by a mortgagee to enforce any of his remedies under the mortgage: and no claim by or against an executor, administrator, or heir as such shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir (Section 44). It will be observed that the words of the law are permissive—"*may* unite," &c. The omission to join will not, therefore, be a bar to subsequent suit brought on a cause of action, which, though it might have been joined with another cause of action in a previous suit, is yet a separate and distinct cause of action from that previously sued upon. Causes of action, in order that they may be joined by plaintiffs in a single suit, must be such as have accrued to them jointly, for plaintiffs cannot join in respect of distinct causes of action. It was decided under the former Code that, if one cause of action is against one person and another cause against another person, they cannot be joined (*Munshí Manírudin Ahmed* v. *Bábú Rám Chand*, &c. 2 B. L. R. 341: *Rání Sarat Sundari Debya*, &c. v. *Surja Kant Acharjya Chaudhrí*, 2 B. L. R. App. 53). This principle will no doubt be followed under the present Code when the subjects of dispute are wholly different. Having seen the result of omitting to sue for a portion of a claim and of omitting to ask for one of several remedies which may be had in respect of the same claim, let us now see what will be the consequence (1) of one or more of those entitled to sue being omitted from the number of plaintiffs; and (2) of one or more of those who may be sued being omitted from the number of defendants. First as to plaintiffs, the general rule is that all those who have the right to sue must be plaintiffs, and the omission of a necessary party as plaintiff will be fatal to the case, unless the omission be amended in time.[1] A *patní talúk*, belonging to several co-sharers, each of whom collected his own share of rent,

Consequence of some of those entitled to sue being omitted as plaintiffs.

[1] At common law the omission of a party as plaintiff in actions on *contract* was fatal except in the case of executors (*Jones* v. *Smith*, 1 Exch. 831). In actions on *torts* the non-joinder of parties jointly wronged could only be taken advantage of by notice of plea in abatement. The Common Law Procedure Act, 1852, first allowed non-joinder of plaintiffs to be amended before or at the trial. In Equity a bill could be amended before answer by adding plaintiffs. Under the present Rules of Court, made in accordance with the provisions of the Supreme Court of Judicature Act, the Court or a Judge has full power to add a plaintiff or plaintiffs at any time before the trial or at the trial—See Order XVI, Rules 2, 13, and 14, to which correspond Sections 27 and 32 of the present Code of Civil Procedure.

was sold for arrears of the *patni* rent. One co-sharer brought a suit in a Munsif's Court to recover possession of his share by setting aside the sale. He valued the suit according to his share and made the other co-sharers defendants. It was held that the suit could not be maintained in this form; that the cause of action was the sale of the whole estate and the suit should have been framed and valued accordingly, and brought in a Court in which the rights of all the parties interested in setting aside the sale might have been declared in one suit (*Unnoda Persad Rai* v. *Erskine*, 12 B. L. R. 370). A, B, C, D, and E were joint lessees of a Government estate, which was sold for arrears of revenue. They each brought separate suits to set aside the sale as to their respective shares. It was decided that this could not be done, and that the defendants were not to be harassed by five different suits—(*Biswanath Bhattacharjya*, &c. v. *The Collector of Maimensingh and others*, 7 B. L. R. Appen. 42). In *Mirza Bedar Bukht Muhammad Ali Bahadúr* v. *Mirza Kharram Bukht Yahya Ali Khan Bahadúr* (19 W. R. 320) the Privy Council strongly intimated that the heirs of a Muhammadan cannot separately sue a debtor to the estate. "It cannot be contended," said their Lordships, "that a debtor to a Muhammadan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt." When a single cause of action accrues to an individual, he has a perfect right, if he wishes, to abandon any portion of his claim or of his remedy, taking the consequence of losing it for ever. So when a single cause of action accrues to several persons jointly, they have together the same right as the individual has: and, if they exercise it together, no one is injured by the act of the other. But if one of those, to whom jointly the cause of action has accrued, were permitted to sue for a portion of the claim or remedy only, the result would be either that the other persons jointly interested with him would be debarred from suing for the portion relinquished or omitted to be sued for in the first instance; or that the defendant would be harassed by several suits. The principle established by the above cases would appear to be that, when a cause of action accrues to several persons jointly, one of those jointly interested is not entitled to split it for the purpose of following his own remedy separately: and this again is involved in the general principle that all must be parties who have the right to sue. But it may so happen that some of those interested will not join as plaintiffs; and thus he, who is interested jointly with them, might be deprived of his remedy, if no other cause were open to him. He can however make them defendants, if they will not join

as plaintiffs, and thus all the parties will be before the Court, which has full power to deal with them. Section 32 of the Code of Civil Procedure enacts that the Court may at any time either upon or without the application of either party, and on such terms as the Court thinks just, order that *any plaintiff be made a defendant or that any defendant be made a plaintiff*, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. No person can however be *added* as a *plaintiff* without his own consent. If the name of a plaintiff have been omitted by mistake, the Court can be asked to remedy the defect under this section: and if it appear at any time to the Court that all those entitled to sue have not appeared as plaintiffs, it has full power to bring them in as parties. If one of several persons jointly interested were to sue and obtain a decree, no objection for non-joinder of plaintiffs being made, and the other persons interested not being made parties, such other persons could scarcely be precluded from suing afterwards. The matter would not be *res judicata* as concerns them, for they were not parties to the first suit; and the defendant could scarcely complain of being harassed by a second suit, as he had made no objection for non-joinder in the former one.

One or more allowed to sue or be sued on behalf of a large number.

It sometimes happens that the number of persons interested is so large that it would be extremely inconvenient, if not impossible, to make them all plaintiffs or defendants. When therefore the interests of all the members of a class are identical, when they all stand in the same situation and have a common right as well as a common interest, one or more of them may, with the permission of the Court, sue or be sued on behalf of all (Section 30 C. C. P). Any one of those interested may however apply to the Court to be made a party to the suit (Section 32, *id*). When persons litigate in this manner *bonâ fide* in respect of a private right claimed in common for themselves and others, the matter will be *res judicata* as concerns all persons interested (Explanation V. *ante*, p. 215).

Consequence of some of those who may be sued being omitted as defendants.

We have next to consider what will be the consequence of omitting from the number of defendants some of those who may be sued. Section 32 of the Code of Civil Procedure gives, as we have seen, full opportunity of adding defendants at any time during the progress of the suit. If however these provisions have not been utilized, and if the suit have proceeded to decree

against some only of those liable, can those who have been omitted as defendants be made liable in a subsequent suit? English Courts of Equity usually required that all the parties liable should be made defendants in order to avoid suits for contribution. At common law the non-joinder as a defendant of a person liable could be taken advantage of by a plea in abatement; but if judgment were recovered against one of two or more joint debtors, such judgment, even without satisfaction, would be a bar to an action against the other or others (*King v. Hoare*, 13 M. and W. 494). A judgment in favour of one was, however, held to be no defence to a subsequent action against the others when it did not appear that such judgment was obtained on a ground which operated as a discharge of all (*Phillips* v. *Ward*, 2 H. and C. 717). In the case of *joint and several* debtors a judgment recovered *with satisfaction* against one would be a bar to an action against the others, but otherwise if the judgment had not been satisfied. Judgment recovered against one of two or more persons, who have jointly committed a tort, will even though unexecuted be a bar to an action against the others (*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584 : 7 C. P. (Ex. Ch.) 547). The general question is one upon which there is some lack of authority in Indian cases. In *Nathú Lal Chaudhrí*, &c. v. *Shanki Lal*, &c. (10 B. L. R. 200) A lent money to B and C, who executed a bond mortgaging certain lands as security for the loan. The money not having been paid, A sued B and C. and obtained a decree against them. In execution of this decree he attached certain joint family property belonging to B, C, D, and E. The shares of D and E were released from attachment, as they were not judgment-debtors under the decree. The whole amount due not having been realized by the sale of the shares of B and C, A brought a second suit against D and E in order to have their shares made liable to his claim on the ground that they were jointly liable with B and C, as all four formed one joint family and the money had been borrowed for the use of such family by B and C acting as managers. It was held that this second suit could not be maintained. Couch, C. J., said:—"The bond must be either a bond of the two and a mortgage of the shares of the two only, or the joint bond of the family. If it is only a bond by the two, the plaintiffs have no cause of action in the present suit, because they had already sued the two, and recovered a portion of the money from them; and they cannot sue other persons not bound by it. But if it is a joint bond by the members of the family, then they have already sued upon it. They have elected to sue some of the persons jointly liable, and not the others; and they have got a decree upon the bond, the

cause of action being the non-payment of the money which the parties were jointly liable to pay. They now sue on the same cause of action the persons whom they might have joined in the former suit, but did not choose to do so. If there is a joint contract, not a joint and several, but a joint contract—and that is all this can be—and the party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable, but were not included in the former suit." In *Abdúr Rahman*, &c. v. *Ganesh Lal* &c. (23 W. R. 444), it was held that the drawer, acceptor, and intermediate indorsers of a dishonoured *hundí* are not liable jointly, but that their liability arises out of different contracts : and that therefore a decree obtained against one of them is not a bar to the maintenance of a suit against another of them.

II. In the second place, the matter must have been *heard and finally decided* in the former suit. In *Chandra Sekhar Deb Rai* v. *Dúrgendra Deb and others* (3 W. R. Civ. Rul. 39), Phear, J., said :—" In order to constitute a *res judicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and been *determined* by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it." There must have been a decision upon the matter alleged to be *res judicata*, which finally granted or withheld the relief sought in respect thereof—*Saikappa Chetti* v. *Rani Kulanda Púri Natchiár*, 3 Mad. H. C. Rep. A. J. 84. This portion of the subject will best be understood by referring to some cases in which it has been held that the matter in issue in the second suit had not been heard and finally decided in the former suit. A case was summarily dismissed on a preliminary point without being tried on the merits. It was held that this was no bar to a second suit—*Shakhi Bewah*, &c. v. *Mehdi Mandal*, &c. 9 W. R. 327 : so when the judgment in the first case had proceeded wholly on a *technical defect* or irregularity and not upon the merits of the case—*Ramnath Rai Chaudhrí* v. *Bhagpat Mahapater*, 3 W. R. Act X. Rul. 140 : also where the first suit had been rejected on the ground that it was *improperly valued*—*Dallabh Jogi* v. *Narain Lakhi*, 4 Bom. H. C. Rep A. C. 110. And now generally the *rejection of a plaint* does not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action (Section 56 of the Code of Civil Procedure). C became surety for the due payment of rent by B to his landlord, A. On default of pay-

Cases in which matter not finally decided in first suit.

ment, A sued B and C in the Revenue Court and obtained a decree, which on appeal was set aside as against C on the ground that the Revenue Court had no *jurisdiction* to pass a decree against the surety. This was held to be no bar to a subsequent suit in the Civil Court against C—*Rani Ganesh Koer* v. *Umdat-an-nissa Begum*, 6 N.-W.-P. Rep. 77. And a second suit has been allowed where a decree had been obtained which proved infructuous on account of non-jurisdiction—*Girish Chandra Mukherji* v. *Ramessuri Debi*, &c. 22 W. R. 308. Under the present Code of Civil Procedure when a plaint is presented to a Court which has not jurisdiction, it should be returned that it may be presented to the proper Court (s. 57). An opinion expressed *incidentally* and not amounting to a finding upon a distinct issue is not a final determination of the matter in question—*Sibnath Chatterji* v. *Nabo Kissen Chatterji*, &c. 21 W. R. 189. The appellant in a certain case died and his widow A was admitted to be his legal representative for the purpose of prosecuting the appeal. Having obtained a decree, A applied to execute it, as well on behalf of herself as on behalf of B, who she alleged was the legitimate son of her husband, born after his death. The legitimacy of B was denied, but was tried in the execution proceedings and decided in his favour. The Privy Council held that this matter was not *res judicata* by a competent Court in a competent proceeding—*Abidanissa Khatún* v. *Amiranissa Khatún*, I. L. R. 2 Calc. 328; S. C. L. R. 4 I. A. 66. An order refusing an application to execute a decree was held not to be an adjudication within the rule of *res judicata* so as to bar a subsequent application—*Dehli and London Bank* v. *Orchard*, L. R. 4 I. A. 127. The dismissal of a suit on the ground of non-service of the summons on the defendant owing to the failure of the plaintiff to pay the Court-fee leviable for service, or the dismissal of the suit because of the non-appearance of either party on the day of trial, will not preclude a fresh suit (ss. 97, 98, 99 of the Code of Civil Procedure). This rule was held to apply under the former Code to a case which had been remanded by an Appellate Court and there dismissed, as neither party appeared in the Lower Court—*Raghanath Sing* v. *Ram Kumar Mandal*, 5 B. L. R. App. 64. A suit dismissed because all the persons who ought to have been plaintiffs did not join in it will not bar a subsequent suit by the proper parties—*Parsan Gopal Paul Chaudhri*, &c. v. *Purnanand Mallick*, 21 W. R. 272. The dismissal of a suit on the ground of *misjoinder* or *multifariousness*[1]

[1] *Multifariousness* is when two or more distinct subjects—subjects not homogeneous—are joined in the same suit against several defendants; when a party is able to say that he is brought as a defendant upon a record with a large portion of

is not a final decision, which will bar a subsequent suit—*Futteh Singh* v. *Latchmí Koer*, 21 W. R. 105; S. C. 13 B. L. R. Appen. 37: *Teluckdhárí Sahú* v. *Bissendro Narain Sahé*, &c. Hay's Reports 528; S. C. Marsh. Rep. 418. It would appear that a case *compromised* is not a case finally decided within the meaning of the rule so as to be a bar to subsequent litigation; but it can scarcely be said that this question is settled—See *Lakshmi Ammal* v. *Tikaram Tovaji*, 1 Mad. H. C. Rep. A. C. 240: and *Jenkins* v. *Robertson*, L. R. 1 H. L. Sc. 117, where Lord Colonsay said:—"A decree obtained by arrangement between the contending parties, the Court bestowing no judicial examination on the merits of the question, can never be *res judicata*." On the other hand, the note to the *Duchess of Kingston's case* contains the following passage (p. 802 of the 7th edition):—"A decree by consent in an amicable suit seems to have an additional claim to be considered final, see *Allason* v. *Stark*, 9 A. and E. 255: *Earl of Hopetoun* v. *Ramsay*, 1 Bell's Appeal, C. 69. Section 375 of the Code of Civil Procedure now enacts that, if a suit be adjusted by *any lawful agreement or compromise*, or if the defendant satisfy the plaintiff in respect of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final.

On the other hand, there are many cases in which, though it is impossible to say literally that the matter has been heard and decided, yet the previous proceedings constitute a bar to further

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which, and of the case made by which, he has no connection whatever. "In order to determine whether a suit is multifarious, or in other words, contains distinct matters," said Sir J. Leach, V. C., "the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the Court, in order that the suit may conclude the whole subject"—*Salvidge* v. *Hyde*, 5 Mad. 146. Misjoinder is either of subjects or of parties. It has been suggested that *misjoinder of subjects* should be predicated of those cases only in which separate and distinct claims are mixed in a bill (or plaint) against the *same* defendant, the term *multifariousness* being confined to cases in whtch there are several defendants: but this distinction in the use of the terms is not always observed. *Misjoinder of parties* is when persons are joined as plaintiffs or defendants, who cannot be properly so joined. Section 31 of the Code of Civil Procedure (following a recent improvement of the law in England) now enacts that no suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it; but nothing in this section enables plaintiffs to join in respect of distinct causes of action.

litigation. The dismissal of a claim, because the plaintiff has failed to produce evidence to substantiate it, has the same effect as a dismissal founded upon evidence, and the subject-matter of such claim will be *res judicata*—*Rama Rao* v. *Suriya Rao*, &c., I. L. R. 1 Mad. 84. When the plaintiff does not appear and the defendant appears and denies the claim or part of it, and the suit is in consequence dismissed wholly or partially, the plaintiff is precluded from bringing a fresh suit upon the same cause of action (sections 102, 103 of the Code of Civil Procedure): so also when a suit abates or is dismissed on account of the death, marriage or insolvency of parties, under the provisions of Chapter XXI of the same Code (section 371). When a claim was preferred to attached property (under section 246 of the old, corresponding to section 278 of the new, Code) and was dismissed, and no suit was brought within the year to set aside the dismissal, it was held that the right to be put in possession of the property was *res judicata* between the decree-holder, who subsequently became the auction-purchaser, and the person who preferred the claim—*The Collector of Ahmedabad* v. *Sámaldás Bechardás*, 9 Bom. H. C. Rep. 205: *Badri Prasad* v. *Muhammad Yusuf*, &c., I. L. R. 1 All. 381. Under the provisions of Explanation III (*ante* p. 215) any relief claimed in the plaint, which is not expressly granted by the decree, must, for the purpose of the section, be deemed to have been refused. The matter of such relief is therefore regarded as heard and finally decided. [1]

Cases in which previous proceedings a bar, though matter not actually heard and decided.

If a plaintiff withdraw from the suit without the permission of the Court, he will be precluded from bringing a fresh suit for the same matter. Section 373 of the Code of Civil Procedure enacts on this subject as follows:—"If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff *(a)* that the suit must fail by reason of some formal defect, or *(b)* that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or for the part so abandoned, the Court may grant such permission on such terms as to

[1] This is in accordance with the decision of the majority of the Full Bench of the Allahabad High Court in *Bhao Singh* v. *Het Ram*, &c., 7 N.-W.-P. Rep. 17; and must be held to alter what was decided on the point in *Balum Butt* v. *Bhúban Lal*, &c., 6 W. R. Civ. Rul. 78. (Here the plaint asked for possession and *mesne* profits, but no issue was raised and no point decided as to the right to *mesne* profits; and a second suit to recover *mesne* profits was held to be maintainable): in *Pratáp Chandra Burud* v. *Rani Surnamayi* 4 B. L. R. F. B. 113: *Tekaet Dúrga Persad Singh* v. *Tekaetni Dúrga Koeri*, &c., 20 W. R. 156; *Bakshiram Gangáram* v. *Darku Tukáram*, 10 Bom. H. C. Rep. 372: and *Rajah Sheorai Nandan Singh* v. *Raj Kumar Babu Deo Nandan Singh*, 24 W. R. 23.

costs or otherwise as it thinks fit. If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter. Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others." And Section 374 enacts that, in any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought.

Provisions similar to the above, but not so precise, were contained in Section 97 of the former Code. With respect to the power of a plaintiff to withdraw from the suit, apart from these express provisions, the following observations of their Lordships of the Privy Council are important:—"We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a *non-suit* known in those Courts. There is a proceeding in those Courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit, but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit, to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit"—*Watson* v. *The Collector of Rajsháhí*, 13 Moo. Ind. Ap. 170. The "liberty to sue again," which gave occasion to the above observations, had been given before Act VIII of 1859 came into operation; but these observations are valuable as showing that, in the opinion of the highest Court of Appeal, there did not exist under the old system of procedure, and apart from the express provisions of the Code of Civil Procedure, any right to withdraw from a suit once commenced, so as to retain the privilege of suing again on the same cause of action. It has been held that Section 97 of Act VIII of 1859 does not apply to cases under Act X of 1859, and it may, therefore, seem that such cases should be governed by the general remarks of their Lordships

of the Privy Council which have been just quoted. It has however been otherwise decided by a Full Bench in *Dayal Chandra Ghose and others* v. *Dwarkanath Misser and others*, Marsh. Rep. 148.

III. We have in the third place to consider in what cases the matter has been decided by a *Court of competent jurisdiction.*

Court must be of competent jurisdiction, concurrent or exclusive.

Whether a particular Court has jurisdiction over a particular subject-matter is a question which arises constantly in India, and the answer to this question is occasionally by no means obvious. Different Courts, Civil Courts and Revenue Courts, were established for different purposes from the earliest period of our rule ; and their separate jurisdictions were not always very accurately defined by the laws under which they were constituted. Some of these Courts were created for a temporary purpose only, and ceased to exist as soon as they had performed the special work for which they were designed. Others have been in the progress of time and reform abolished or materially altered, their jurisdiction being either transferred to other tribunals or so essentially changed as to involve the creation of almost a new tribunal. To give the merest intelligible sketch of all the Courts that have existed in India since the establishment of British rule, and of their various jurisdictions, would occupy a considerable amount of space, and would be inconsistent with the design of this work.[1] It must, therefore, suffice to say here that the Courts, both Revenue and Civil, in each Presidency are constituted and regulated by different Acts of the Legislature : for example, the Civil Courts in Bengal, by Act VI of 1871—the Civil Courts in the Madras Presidency, by Act III of 1873—the Civil Courts in the Bombay Presidency, by Act XIV of 1869—the Civil Courts in Oudh, by Act XXXII of 1871—the Civil Courts in the Panjáb, by Acts XIX of 1865, IV of 1866, XXVII of 1867, and VII of 1868—the Civil Courts in the Central Provinces, by Acts XIV of 1865 and XXVII of 1867—the Civil Courts in the Jhánsí District, by Act XVIII of 1867—the Civil Courts in British Burmah, by Act XVII of 1875—the Civil Courts in the Province of Sind, by Acts XII (Bom. C.) of 1866, III (Bom. C.) of 1868, and V of 1872—the Courts in Coorg, by Act XXV of 1868—the Courts at Aden, by Act II of 1864—the Courts of Small Causes in the Presidency Towns, by Acts IX of 1850, XX of 1857, and XXVI of 1864—Courts of Small Causes outside the Presidency Towns, by Acts XI of 1865 (which gives jurisdiction up to Rs. 500, which may be extended by the Local Government to Rs. 1,000, in cases of claims for

[1] A full account of these Courts in the Bengal Presidency will be found in Chapter IV of the Author's *Introduction to the Bengal Regulations.*

money due on bond or other contract, rent, personal property, and damages), X of 1867, &c—Revenue Courts in the Bengal Presidency, by Acts X of 1859, XVIII and XIX of 1873 (N.-W.-P. only), VI (B. C.) of 1862—Revenue Courts in the Province of Oudh, by Act XIX of 1868—Revenue Courts in the Madras Presidency, by Act VIII (M. C.) of 1865, &c. &c.[1] One main feature to be found in all or most of these Acts is the constitution of Courts of various grades with different pecuniary limits of jurisdiction.[2] The Revenue Courts have jurisdiction, generally speaking, in matters connected with the Government revenue (and here the jurisdiction of the regular Civil Courts is usually excluded), and with the rent of land used for agricultural purposes. The tendency of modern reform is to extend the jurisdiction of the regular Civil Courts to matters which were formerly reserved to the Revenue Courts only. For example, in Lower Bengal, Act VIII (B. C.) of 1869 has, in those districts in which it has been put into operation, transferred to the Civil Courts the jurisdiction previously exercised by the Revenue Courts in all questions arising between the landlords and tenants of land used for agricultural or similar purposes.

Jurisdiction of the High Courts.

The *ordinary* original civil jurisdiction of the Calcutta High Courts extends to suits of every description arising within the limits declared and prescribed by the proclamation fixing the limits of Calcutta, issued by the *Governor-General* in Council on the 10th September, 1794 A. D., or such other local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen either wholly, *or, in case the leave of the Court shall have been first obtained, in part,* within the local limits above-mentioned, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits

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1 The above list includes the most important of the Acts now in force. Others also in force, and all those that have been repealed, will be found in the Author's "Chronological Table of, and Index to, the Indian Statute Book."

2 It may be observed that the valuation of a suit for the purposes of jurisdiction is distinct from the valuation of a suit for the purposes of the Stamp revenue, and is not to be made under the rules contained in the Court Fees Act, VII of 1870, but upon the best evidence available and bearing upon the actual amount or value of the subject-matter in dispute. The value of the property for the purpose of jurisdiction is a question of fact open to appeal. The value of the property for the purpose of the stamp revenue is not a question open to appeal—*Jibraj Singh* v. *Inderjit Mahton*, 18, W. R. 109: *Nanhún Singh* v. *Túphani Singh* 20, W. R. 33; S. C. 12 B. L. R. 113.

(Sections 11 and 12 of the Letters Patent of 1865). Where leave is required, if such leave be not obtained previous to institution, the Court has no jurisdiction—*Sheikh Abdúl Hamid* v. *Promothonath Bose*, 1 *In. Jur.* 218 : *Jagadamba Dasi* v. *Padmamani Dasi*, 6 B. L. R. 686 : *Harjiban Das and others* v. *Bhagwan Das*, 7 B. L. R. 103 : *Mothúr Mohan Rai* v. *Judumani Dasi*, 10 B. L. R. 122 : *Hadji Ismail Hadji Habib* v. *Hadji Mohamed Hadji Jusab*, 13 B. L. R. 91 ; S. C. 21 W. R. 303 : *Jagadamba Dasi*, &c. v. *Padmamani Dasi*, &c. 15 B. L. R. 318 : and *Mulchand Johárimal* v. *Suganchand Shivdas*, I. L. R. 1 Bom. 23. The mere fact of the parties being personally subject to the jurisdiction of the Court will not give the High Court authority to try a case which is for land situate beyond the local limits of its jurisdiction—*The East India Railway Company* v. *The Bengal Coal Company*, I. L. R. 1 Calc. 95 : *The Delhi and London Bank* v. *Wordie*, &c., I. L. R. 1 Calc. 249. In the exercise of its *extraordinary* civil jurisdiction it has power to remove and try any suit being or falling within the jurisdiction of any Court subject to its superintendence (section 13, *id*). The Madras and Bombay High Courts have *ordinary* original civil jurisdiction within the local limits of the Presidency Towns of Madras and Bombay respectively; and have similar extraordinary original civil jurisdiction. The High Court for the North-Western Provinces has no ordinary original civil jurisdiction, but has similar extraordinary original civil jurisdiction—see the Letters Patent of these Courts respectively. The High Courts have no jurisdiction in matters connected with the revenue (*In the matter of Audhar Chandra Shaw*, &c., 11 B. L. R. 250 : *Nabin Chundra Dey* v. *The Secretary of State for India*, 24 W. R. 309).

Jurisdiction of the Regular Civil Courts.

The regular Civil Courts beyond the local limits of the Presidency Towns have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force (section 11 of the Code of Civil Procedure, Act X of 1877). "*Ubi jus, ibi remedium*" is the maxim of the law—*where* there is a right, *there* there is a remedy. "If the plaintiff has a right," said Lord Holt in the case of *Ashby* v. *White*, "he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy,

[1] "Right,—the capacity or power of exacting from another or others acts or forbearances—is nearest to a true definition. For all these reasons I say that a party has a right, when another or others are bound or obliged by the law, to do or to forbear *towards* or *in regard of* him." (Austin, Lecture XVI, Vol. I—p. 410, and see for other definitions page 411.)

for want of right and want of remedy are reciprocal." This language indicates broadly the two classes of cases in respect of which the Civil Courts have jurisdiction, *viz.* (1) suits brought to vindicate, maintain, or enforce rights, and (2) suits brought to obtain damages for injury in the exercise or enjoyment of rights. In respect of both classes the regular Civil Courts have jurisdiction unless such jurisdiction have been expressly taken away by the Legislature, as, for example, in the case of those suits which are cognizable by the Revenue Courts only. That there is no precedent for a particular action is not an argument which should prevent a Civil Court from exercising its jurisdiction. "Where cases are new *in their principle*, there I admit," said Ashurst, J. in *Pasley* v. *Freeman* (3 T. R. 63), "that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new *in the instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case that may arise two centuries hence, as it was two centuries ago." To enumerate all the cases in which, upon the application of these principles,[1] it has been held that the Civil Courts in India have jurisdiction, would occupy more space than the design of the present work admits. It will, however, be useful to mention a few cases in which the doubt which formerly prevailed has been removed by judicial decision; or which, by reason of their peculiar importance, are deserving of special notice. Before doing so it may be well to observe that all Civil Courts in India have full powers to afford a complete remedy in all cases which are within their cognizance; and that the distinction between Common Law and Equity, which in England created two separate sets of tribunals, has no existence in India. The regular Civil Courts have been held to have jurisdiction to entertain a suit for declaration that an alleged *Hindu marriage* is invalid (*Aunjona Dasi* v. *Prahlad Chundra Ghose and others*, 6 B. L. R. 243):—or for the *restitution of conjugal rights* (*Múnshi Bazlúr Rahím* v. *Shamsúnissa Begúm*, 11 Moo. In. Ap. 553; *Chatan Bibí* v. *Amír Chand*, 6 W. R. Civ. Rul. 105):—or for restitution to *caste* (*Ram Kanth* v. *Ram Lochun Acharjya*, p. 535 of the Rep. of the Ben. S. D. A. for 1859; *Sonaúla Kolal* v. *Mahassun Kolal*, p. 541 of Rep. of Ben. S. D. A. for 1848: *Gopal Gurain* v *Gurain*, 8 W. R. Civ. Rul. 299):—or for a declaration of exclusive

Some doubtful cases in which the Regular Civil Courts have jurisdiction.

[1] The student is recommended to read, in connection with what has been said above, the case of *Ashby* v. *White and others*, and Mr. Smith's Note thereto, 1 Leading Cases, 7th Ed. 251.

right to the privilege of administering *purohetam* or religious service to pilgrims resorting to a shrine, such right being capable of alienation or delegation, and being in the nature of a proprietary right[1] (*Sunkur Bhartí Sivami* v. *Sidha Lingaya Charanti*, 3 Moo. In. Ap. 198):—or in respect of a right to offerings collected at shrines or temples (*Raní Sadat Kaur* v. *Jowalla Persad*, p. 720 of Rep. of Ben. S. D. A. for 1861; *Madhabí Panda and another* v. *Búdí Maha Pathur*, p. 1820 of Vol. II of Ben. S. D. A. Rep. for 1856):—for a share of the fees obtained by a joint family of *purohits* on the ground that a partnership existed between the plaintiff and defendants, or that they are bound by a contract express or implied to share their earnings (*Magjú Pandaen* v. *Ramdyal Tewarí and others*, 8 B. L. R. 50; *Khedrú Ojha and another* v. *Mussamat Deo Raní Kumar* 5 W. R. Civ. Rul. 222; *Becharam Banerjí* v. *Srímatí Takúr Raní Debya*, 8 B. L. R. 53, *note*, and 10 W. R. 114; *Jawahir Misser* v. *Bhagú Misser*, p. 362 of Ben. S. D. A. Rep. for 1857; *Dirga Persad* v. *Budrí*, &c., 6 N.-W.-P. Rep. 189):—for damages for mere verbal abuse, which may injure or outrage the feelings (*Gaur Chandra Patitandí* v. *Clay*, 8 W. R. Civ. Rul. 256; *Kalí Kúmar Mittra* v. *Ramgatí Bhattacharyja and another*, 6 B. L. R. App. 99; *Sheikh Takí* v. *Sheikh Khoshdel Biswas*, 6 W. R. Civ. Rul. 151; *Múlví Gholam Hosen* v. *Har Gobind Dass*, 1 W. R. Civ. Rul. 19):—for damages against a Magistrate who has not acted reasonably, carefully and circumspectly in the discharge of his duties (*Vinayak Divakar* v. *Bai Itcha*, 3 Bom. Rep. 36):—nor with good faith (*Vinayah Divakar* v. *Armstrong*, 3 Bom. Rep. 47):—for damages in respect of an act which amounts to a *criminal offence*, although no criminal prosecution have been instituted, there being no Act of the Legislature which bars the cognizance of such a suit, and the Civil Courts not being at liberty to act upon their own notions of policy (*Shama Charan Bose* v. *Bhola Nath Dutt*, 6 W. R. Civ. Ref. 9; but see as to the High Court on its original side, *Kunamal* v. *Sarna Raur*, 2 Jur. N. S. 187):—in a suit against defendants resident within the jurisdiction for damages for, and to restrain by injunction, an alleged illegal disturbance of a right to fish in the sea below low water mark and within three miles of it (*Bában Mayacha*, &c., v. *Nagu Shrávucha*, &c., I. L. R. 2 Bom, 19):—to recover money obtained by extortion (*Ramgati Dass* v. *Gholam Ahmed Khundkar and others*, W. R. Special Number 85):—to set

[1] Explanation to Section 11 of the Code of Civil Procedure enacts that a suit, in which the right to property or to an office is contested, is a suit of a Civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

aside a registered mortgage-deed and have it declared a forgery, the alleged registration being held to cast a cloud on plaintiff's title and depreciate the value of his property (*Fakir Chand* v. *Takúr Singh*, 7 B. L. R. 614) :—for maintenance by a Hindú wife, notwithstanding the provisions of the Code of Criminal Procedure in this, behalf, see Chap. XLI. Sections 536, 538, Act X of 1872 (*Lalla Gopinath* v. *Mussamat Jitan Kúar*, 6 W. R. Civ. Rul. 57) :—in a suit against Government for the wrongful dismissal of one of its servants (*Hughes* v. *The Secretary of State for India in Council*, 7 B. L. R. 688) :—in a suit to recover money paid in satisfaction of a decree otherwise than into Court, the decree-holder not having certified the payment to the Court and having sued out execution notwithstanding (*Gunamani Dasi* v. *Prankishori Dasi*, (Full Bench) 5 B. L. R. 223, overruling *Jamir Mandal* v. *Brajanath Chakravartti*, Suth. S. C. C. Ref. 73, and *Alamja Bibi* v. *Gúrú Charan Rai*, 3 W. R. S. C. C. Ref. 3; see also *Sújan Mandal* v. *Wazir Mandal*, 6 W. R. Civ. Ref. 29, and *Bhagowan Tanti* v. *Gobind Chandra Rai*, 9 W. R. 210). A Full Bench of the Madras High Court have ruled, on the contrary, that such a suit is not maintainable (*Arunáchella Pillai* v. *Appavú Pillai*, 3 Mad. Rep. 188; see and distinguish *Kunhi Moidin* v. *Ramen Unni*, I. L. R. 1 Mad. 203). Section 258 of the Code of Civil Procedure now provides that when the decree-holder fails to certify to the Court a payment or adjustment made out of Court, the judgment-debtor may apply for an order directing him to certify, and the Court after hearing the decree-holder may make such order, and if the decree-holder disobeys the same, may refuse further to execute the decree. As a sufficient remedy is thus provided, it will probably be held that a separate suit will not lie.

Cases in which the Civil Tribunals have been held to have no jurisdiction.

The Civil tribunals have no jurisdiction to entertain a suit brought to obtain a declaration of right to membership in a *somaj* or society, exclusion therefrom not affecting any right of property nor bringing deprivation of caste (*Sadharam Patar* v. *Sadharam and others*, 3 B. L. R. 91; *Jai Chandra Sirdar and another* v. *Ramcharan and others*, 6 W. R. Civ. Rul. 325) :—or for specific performance of a contract of marriage (*In the matter of Gunpat Narain Singh*, I. L. R. 1 Calc. 74; *Sheikh Bhagan* v. *Sheikh Ramjan*, 24 W. R. 380) :—or for declaration of a right to be summoned to all marriages and to receive a present of *pân* from the members of a particular community (*Ram Gatri Bishwas* v. *Mahadeo Banick*, p. 64 of Rep. of Ben. S. D. A. for 1850) :—or for declaration of

right to be shaved by the village barber (*Phagúna Nayí* v. *Menei Matha*, p. 465 of Rep. of Ben. S. D. A. for 1854):—or for a right to offerings made by *jajmans* to the *purohit* or family priests, such offerings being of a personal nature and the *jajmans* being at liberty to select their own *purohit* (*Rumokant Surma and others* v. *Gobind Chand Surma*, p. 398 of Ben. S. D. A. Rep. for 1852: *Lalla and others* v. *Ganeshi*, p. 509 of N.-W.-P. S. D. A. Rep. for 1856: *Rudarman Misser* v. *Damudar Misser*, 1 Hay's Reports 365; and see *Nabin Chandra Datt* v. *Madhab Candra Mandal*, 5 W. R. Civ. Rul. 225):—or for damages against a Magistrate acting judicially and with jurisdiction, although carelessly and irregularly (*The Collector of Húghlí and Iswar Chandra Mittra* v. *Turaknath Mukhapaday*, 7 B. L. R. 449, and see Act XVIII of 1850):—or for the re-instatement of a *Ghatwal*, who has been dismissed by the Police authorities, in the lands which he formerly held as *Ghatwal* (*Debi Narain Singh* v. *Srikishen Sen and the Collector of Bírbhúm*, I. W. R. Civ. Rul. 321):—or for compensation for loss sustained in consequence of a private *ferry* being resumed by Government and made a public ferry, Ben. Reg. VI of 1819 providing specially therefore (*The Collector of Patna* v. *Ramanath Takúr and others*, Full Bench, 7 W. R. Civ. Rul. 191):—or to have an order set aside which was made on appeal under Section 33 of the District Municipal Improvement Act, III (B. C.) of 1864 (*Manesur Das*, &c. v. *The Collector and Municipal Commissioners of Chapra*, I. L. R. 1 Calc. 409):—or where the act complained of is an act of State done by the Government as a Sovereign power (*East India Company* v. *Kamachí Boye Chiba*, Suth. Priv. Coun. Ap. 373).

The Civil Courts in India have fixed local and pecuniary limits of jurisdiction. Numerous questions have from time to time arisen as to the Court in which a particular suit should be instituted, regard being had to these limits. The whole matter has now however been much simplified by the rules contained in the new Code of Civil Procedure, Act X of 1877. Every suit must be instituted in the Court of the lowest grade competent to try it (s. 15). Generally speaking, suits relating to immovable property must be instituted in the Court within the local limits of whose jurisdiction the property is situate (s. 16). Other suits must be instituted in the Court within the local limits of whose jurisdiction the cause of action[1] arose, or all the defendants at the time of the commencement of the suit actually and voluntarily reside or carry on business or personally work for gain; or some of the defendants so reside or carry on

[1] As to *cause of action* see *ante* p. 218 Note. *Gopi Krishna Gosami* v. *Nilkamal Banerji*, &c. 13 B. L. R. 461; and *Hills* v. *Clark*, 14 B. L. R. 367.

business or work for gain, provided that the leave of the Court is given, or the defendants who do not reside or carry on business or work for gain within the jurisdiction acquiesce in such institution (s. 17). Suits for compensation for wrong done to person or movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides or carries on business or personally works for gain within the local limits of the jurisdiction of another Court, may at the option of the plaintiff be instituted in either Court (s. 18). When immovable property is situate within the local limits of jurisdiction of more Courts than one, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate (s. 19), When land has been demarcated by the Survey Authorities as belonging to a particular district, it belongs *de facto* to that district, and all suits concerning it must be brought in the Courts having jurisdiction in such district; nor is this rule affected by the fact that the very object of the suit is to have the land declared to be part of an estate belonging to another district, and so to be situate within another local jurisdiction (*Srinath Dutt Chaudhri* v. *Durga Dass Rai Chaudhri*, Suth. Rep. Jan.—July, 1864, p. 360; *Radha Madhab Banerji* v. *Raja Damúdar Singh Audhaj*, *id.* p. 369; *Sham Kanth Lahori Chaudhri* v. *Bhagirutti Chaudhrain and others*, Hay's Reports, p. 485; *Kali Kúmar Mukherji* v. *The Maharaja of Burdwan*, 5 W. R. Civ Rul. 39; *Pahalwan Singh, &c.* v. *Maharaja Mahessur Baksh Singh*, 12 B. L. R. 391). The High Court or the District Court may, either on the application of the parties or of its own motion, transfer any suit pending in a Subordinate Court to any other Subordinate Court competent to try it in respect of its nature and the amount or value of its subject-matter (s. 25).

Jurisdiction of Courts of Small Causes in the Mufassil.

Courts of Small Causes outside the local limits of the Presidency towns have jurisdiction if the defendant at the time of the commencement of the suit dwells or personally works for gain or carries on business within the local limits of the jurisdiction of such Courts; *or if the cause of action arose within the said local limits and the defendant, at the time of the commencement of the suit, by his servant or agent carries on business or works for gain within those limits* (section 8, Act XI of 1865). Where the cause of action arises within the local limits, but the defendant does not either personally or by his servant or agent carry on business or work for gain within such limits, it is clear that, under the old Code of Civil Procedure, the ordinary Civil Court had, and the Court of Small-

Causes had not, jurisdiction. But now it will be necessary to consider the effect of extending to Courts of Small Causes the provisions of section 177 of the new Code of Civil Procedure (see Schedule II of the Code). The suits cognizable by a Court of Small Causes are claims for money due on bond or other contract, or for rent other than the rent of land for which a suit may be brought in the Revenue Courts, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of five hundred rupees. The Local Government may, however, extend the limit of pecuniary jurisdiction to an amount not exceeding one thousand rupees. These Courts have no jurisdiction on a balance of partnership account,[1] unless the balance have been struck by the parties or their agents, nor for a share or part of a share under an intestacy, nor for a legacy or part of a legacy under a will, nor for the recovery of damages on account of an alleged personal injury unless actual pecuniary damage shall have resulted from the injury (sections 6 and 7, Act XI of 1865).

Cases in which Courts of Small Causes have jurisdiction.

On the construction of these sections a considerable number of cases have been decided. In the following suits it has been held that Courts of Small Causes have jurisdiction, *viz.*,—for the *value of trees* cut down and removed, even though the question of *title* may have to be incidentally adjudicated upon (*Raghúram Biswas and others* v. *Ram Chandra Dobay and another*, Suth. S. C. C. Ref. 51; S. C. B. L. R. Sup. Vol. F. B. 34: *Sib Din Tewari* v. *Bákshi Ram Pertab Singh*, W. R. Jan.—July, 1864, Mis. Rul. 3: *Sambhú Chaudhri* v. *Combs*, 2 W. R. Civ. Rul. 179; and see *Kenny* v. *Amírudín Mandal*, Suth. S. C. C. Ref. 14; and *Sukada Sundari Debya* v. *Sarúp Sheik*, *id.* 17):—or for the value of crops illegally removed (*Ram Jíban Rayí* v. *Shahazadí Begum*, 9 W. R. 336; but see *Ammallú Ammal* v. *Subhú Vadiyar*, 2 Mad. Rep. 184):—or in a suit by one of several joint owners of property against his co-sharers for his *share of the profits* (*Kandarí Joadar* v. *Manik Joadar and another*, Suth. S. C. C. Ref. 23: *Jainarain Manjí* v. *Madhú Súdhan Gorait*, 2 W. R. Civ. Rul. 134):—in a suit by one co-owner for his *share of the price* of personal property sold without his consent or authority by another co-owner (*Radhanath Saha* v. *Kaminí Sundarí Dasí*, 2 W. R. Civ. Rul. 37):—in a suit for *cattle* or for the value of cattle (Suth. S. C. C. Ref. 117, and 2

[1] The adjustment of an account, it may be observed, can be proved by oral evidence and need not necessarily be in writing (*Purnima Chaudhrain and others* v. *Nityanand Saha and others*, W. R. Special Number 82; B. L. R. Sup. Vol. 3; and see Section 59, *post*.)

W. R. S. C. C. Ref. 5) :—in a suit on an *instalment-bond* given for arrears of rent (*Rájá Shatt Charan Ghosal* v. *Mahomed Ali*; *Tarini Charan Rai* v. *Gopal Krishto Rai*, 2 W. R., S. C. C. Ref. 5, and Suth. S. C. C. Ref. 118) :—in a suit to recover a thatch of less value than Rs. 500, such thatch being severed from the house and therefore movable property (*Rajkumar Mukhapadhya* v. *Prannath Mukhapadhya*, 7 B. L. R. App. 41) :—in a suit to *establish a right to movable property* (of value less than Rs. 500) seized and sold in the execution of a decree, such suit being brought after the rejection of a claim under Section 246 of Act VIII of 1859 (*Umesh Chandra Bose* v. *Madan Mohun Sirkar*, 2 W. R. Civ. 44) :—in a suit on a *contract for the payment of a stipulated monthly sum* for the use of a path (*Uma Persad Saha* v. *Shamsher Sirdar Mihter*, 4 W. R. S. C. C. Ref. 10; see also *Brice* v. *Toogood*, 5 W. R. S. C. C. Ref. 18 :—or for payment of a sum in consideration of which plaintiff agreed to let defendant tap his date trees and appropriate the produce for a single season (*Debnath Ghose* v. *Pachú Mála*, 6 W. R. Civ. Ref. 8): —when the amount claimed is within the limits of the Court's pecuniary jurisdiction, although the bond on which the claim is made be for a sum beyond such limit (*Súkí Maní Debya* v. *Hari Mohan Mukherjí and others*, 5. W. R. Civ. Ref. 6; and see *W. Kuppu Chetti* v. *C. Chidambaba Mudali* 3 Mad. Rep. O. J. 170: *Ewart Latham & Co.* v. *Haji Mahomed Seddik*, 3 Bom. Rep. O. J. 133; and *Aganitha Narainyanappaiyan and others* v. *Ganapati Aiayan and others*, 2 Mad. Rep. 469) :—in a suit for the rent of *land used for building purposes* (*Piyarí Bewah* v. *Nokúr Karmokar*, 19 W. R. 308: *Gokul Chand Chatterji* v. *Mosarú Kundú*, 21 W. R. 5):—where *rents were assigned* by way of mortgage for the liquidation of a bond-debt and the questions to be decided were as to the amount due on the bond and as to payment by means of the rents assigned (*Mahima Chandra Mukherji* v. *Ram Charan Rai*, 6 W. R. Civ. Ref. 16):—so where a simple money decree is sought, *although land be hypothecated* by the bond upon which the claim is based (*Dúrhyar Rai* v. *Dulsingar Singh*, 11 W. R. 267) :—in a suit by a *zemindar* against a *patnidar* for *dák expenses* (*Maharajah Dheraj Mahtab Chandra Bahadúr* v. *Rájá Binod Chaudhri*, 8 W. R. 517; *Erskine* v. *Trilochan Chatterji*, 9 W. R. 518) :—in a suit to recover the *purchase-money of land*, the vendor having failed to complete the bargain (*Charú Khan* v. *Dúrgamaní*, 9 W. R. 498) :—for *mesne* profits only, when no question of title or right arises (*Ram Piyari Debya and another* v. *Dinanath Mukherji*, 2 B. L. R. Short Notes xiii):—for damages for a *malicious prosecution*, special pecuniary loss resulting therefrom being alleged (*Sitarraman and others* v. *Susa Pillai and another*, 2 Mad. Rep. 254):—

for damages in consequence of an injunction, there having been no award of compensation under Section 96, Act VIII of 1859 (*Nanda Kumar Saha* v. *Gaur Sankar and another*, 5 B. L. R. App. 4).

Cases in which Courts of Small Causes have not jurisdiction.

In the following cases, on the other hand, Courts of Small Causes have been held to have no jurisdiction, *viz.*—where a set-off was pleaded, which was in excess of the amount cognizable by a Court of this kind, and which also constituted a claim for rent cognizable by the Revenue Courts (*Kenny* v. *Nabin Chandra Bose*, Suth. S. C. C. Ref. 21):—where, in a suit for a *share of the rent of a house* which formed but a portion of the joint property, it was pleaded that plaintiff was indebted to the defendant for money received on account of such joint property (*Ram Kúmar Chaudhrí* v. *Shama Charan Chaudhrí and others*, Suth. S. C. C. Ref. 33):—in a suit for rent of land for which no rent had been paid, the plaint asking for assessment of the rate of rent (*Kedarnath Chakravartti* v. *Gopinath Ghose*, 23 W. R. 426):—where the claim was for *maintenance* settled by a will, and involved long and intricate investigations (*Tara Sundarí Debya* v. *Hara Sundarí Debya and others*, Suth. S. C. C. Ref. 66):—so also where the right to the *maintenance* had already been established in the regular Civil Court and arrears thereof were claimed (*Nabín Kalí Debya* v. *Bindú Bashiní Debya and others*, 5 W. R. S. C. C. Ref. 5; and see *Bhagwan Chandra Bose* v. *Bindú Bashiní Dasí*, 6 W. R. Civ. Rul. 286, and *Kaminí Dasí* v. *Bissonath Saha*, 9 W. R. 214):—in a suit for the *half value of the crop* by a *raiyat* who had sublet his land on the condition that the *sub-lessee* should supply the seed and the labour and give him half the crop when raised; but otherwise, if the relation of master and servant merely was created by the contract (*Srínath Dutt* v. *Dwarí Dhallí*, Suth. S. C. C. Ref. 113, and 2 W. R. S. C. C. Ref. 2; but see *Garíbúla Poramanic* v. *Fakír Mahomed Kholú*, 10 W. R. 203):—in a suit for the *price of bricks* carried away, and involving a declaration of title to half the real property (*Matharnath Goshwamí* v. *Gobind Mai Goshwamí*, 4 W. R. Civ. Rul. 58):—in a suit for debt against a Military officer in a cantonment, where there was a Court of Requests (*Abú Sait and others* v. *Arnott*, 2 Mad. Rep. 439; *Hosainí* v. *Lt. Dickenson*, 9 W. R. 112; but see *Bastain* v. *Tireman*, 2 Mad Rep. 389):—or against a native camp-follower (*Masírudin* v. *Khúda Baksh*, 10 W. R. 386):—or against the wife of a soldier (*Keeffe* v. *Christie*, 5 W. R. S. C. C. Ref. 21; and see the provisions of the latest Mutiny Act):—in a suit by one *co-sharer of a revenue-paying estate* to recover from another sharer his proportion of the Government revenue paid to save the estate from sale (*Madú Súdan Mazimdar and others* v. *Bindú Basiní Dasí and others*, 6 W. R. Civ. Ref. 15:

Bramarup Goswami v. *Prannath Chaudhri and others*, 7 W. R. 17: *Kalinath Rai* v. *Nila-Ram Poramanic*, 7 W. R. 32: *Ram Baksh Chittangeo and another* v. *Madhu Súdhan Paul Chaudhrí and others* (Full Bench), 7 W. R. 377, overruling *Ram Mani Dasi* v. *Piyar Mohan Mazimdar*, 6 W. R. Civ. Rul. 325):—for *specific performance* of a contract (*Nilkant Surma and others* v. *Bissen Basi and others*, 6 W. R. Civ. Rul. 322):—for *contribution*, where the right to recover is founded merely on a *quasi*-contract (*Ram Baksh Chittangeo and another* v. *Madhú Sudhan Paul Chaudhrí and others* (Full Bench) 7 W. R. 377: *Sripati Rai* v. *Laharam Rai and others*, 7 W. R. 384: *Sabú Meaji* v. *Nurai Mulah and another*, 7 W. R. 386: *Tamizudín Mirdah* v. *Gaffur Khan*, 7 B. L. R. App. 40):—for *salvage* (*Kishore Singh and others* v. *Ganesh Mukherji*, 9 W. R. 252; and distinguish *Grant and others* v. *Madhú Súdhan Singh and others*, 10 W. R. 79):—in a suit to recover *huts* purchased at a sale in execution or the value thereof (*Rohini Kant Ghose* v. *Mahabharat Nag and others*, 10 W. R. 258; and see *Natú Meah and others* v. *Nund Rani* (Full Bench), 8 B. L. R. 508):—or for *crops* which have not been severed from the ground, for they are immovable property (*Mahomed Súlimaun Valid Mahomed Ishakbhai* v. *Satú Valad Harji*, 4 Mad. Jur. 454: *Gopal Chandra Biswas* v. *Ranjan Sirdar and another*, 5 B. L. R. 194);—or for *defamation* of character, where there has not been any actual pecuniary loss (*Bheirub Chandra Chakravartti* v. *Mahendra Chandra Chakravartti*, 4 B. L. R. App. 59; *Raj Chandra Chakravartti and others* v. *Panchanan Surma Chaudhri*, 4 W. R. Civ. Rul. 7):—or for personal *injury*, where no actual pecuniary loss has resulted therefrom (*Ali Baksh and another* v. *Sheikh Samirudín*, 4 B. L. R. 31).

Distinction between the jurisdiction of the Civil and Revenue Courts.

The distinction between the jurisdiction of the Civil Courts and of the Revenue Courts is one of the most important portions of the present subject. The exact boundary which separates these jurisdictions differs in each Presidency; and indeed has differed in the same Presidency and even in smaller territorial divisions according to the different views of policy in this matter which have from time to time prevailed. To give any detailed account of these changes here would be difficult and indeed out of place.[1] What follows is concerned with the existing state of the law, with which some acquaintance is necessarily presumed.

[1] So far as the Bengal Presidency is concerned, a full account will be found in Chapters III and IV of the *Introduction* to the Author's edition of the *Bengal Regulations*.

Partition of estates.

Under the provisions of Bengal Regulation XIX of 1814, the partition of estates paying revenue to Government is to be made by the Collector or other Revenue authority. If, however, there is a dispute as to title or as to the shares of the parties admittedly interested, this dispute must be settled before the Revenue authorities can proceed to make the partition, and the Civil Courts have jurisdiction to adjudicate upon such disputed question of title or of shares. Parties wishing to object on this ground must do so within *fifteen* days from the date of the publication of the advertisement provided for in clause 2, Section 4. The paper of partition is submitted by the Collector to the Commissioner or Board of Revenue, whose determination thereupon is final (section 20), and cannot be questioned by a suit in the Civil Court (*Zaker Ali Chaudhri* v. *Jagdessuri*, 1 W. R. Civ. Rul. 3-3: *Ramsahai Singh and others* v. *Syud Mazhar Ali and others*, 2 B. L. R. App. 41: *Radha Balabh Singh* v. *Maharajah Dheraj Mahatab Chand Bahádúr*, 2 W. R. Mis. Rul. 51). This finality, however, extends only to those matters which are within the special jurisdiction of the Revenue authorities, *viz.* the apportionment of the revenue, &c., and not to questions of right and title over which they have no jurisdiction. Although, therefore, a suit cannot be maintained in the Civil Court for the purpose of enforcing a re-distribution of the lands and of the Government revenue, a suit will lie for a declaration of right to a larger share than that recorded in the paper of partition; and as to this excess the plaintiff may be declared a shareholder in the *patti* or divided estate in which it may have been included (*Spencer* v. *Pahal Chaudhri and others*, 6 B. L. R. 659 663, note: *Hari Persad Jah* v. *Madan Mohun Tákur and another*, 8 B. L. R. App. 72). The Civil Court has jurisdiction to determine the *right* to a partition, though the partition itself must be carried out by the Collector (*Muhsan Ali* v. *Nasam Ali*, 6 W. R. Civ. Rul. 15). When a Civil Court having adjudicated upon a question of title has issued a precept to the Collector to have a partition made, such Court can direct by whom the costs of making the partition are to be paid, and the Revenue authorities are bound by the orders of the Civil Court on this point (*Baijnath Saha* v. *Lalla Sithal Persad*, 2 B. L. R. F. B. 1, and 10 W. R. F. B. 66: *Har Gopal Das* v. *Ram Golam Sahú*, 5 B. L. R. 135). The Bengal Regulation XIX of 1814 applies only to the partition of estates paying revenue to Government. It does not exclude the jurisdiction of the Civil Court, when it is unnecessary to apportion the revenue, as for example, when a suit was brought to obtain a partition of land which had accreted to an estate, a partition of which and of the revenue payable on which had been previously effected, no separate revenue being payable for the

accreted land (*Rani Shama Sundari Debi* v. *Koer Poresh Narain Rai, &c.*, 20 W. R. 182). The Civil Courts have exclusive jurisdiction over the partition of *lakheraj* or revenue-free estates (*Fatteh Bahadúr* v. *Janaki Bibi and another*, 4 B. L. R. App. 55).

The provisions for partition of revenue-paying estates in the North-Western Provinces are contained in Sections 107, 139 of the North-Western Provinces Land-Revenue Act, XIX of 1873: and they may be applied by order of the Collector of the District to *mahals* or estates held free of revenue. Section 135 enacts that no Civil Court shall entertain any suit or application for partition. When a partition had been arranged by arbitrators, carried into effect by an amín, accepted by the parties and sanctioned by the Commissioner, it was held that the Civil Court had no jurisdiction to entertain a suit brought by one of the parties to recover an additional portion of *abádí* land, to which he alleged that he was entitled according to the map filed by the amín (*Fida Hosen, &c.*, v. *Ghulam Jalani*, 7 N.-W.-P. Rep. 346). A partition was assented to by the parties, A and B, and was accepted by the Deputy Collector. Some months after, B, complaining that A had obtained an excess of good and irrigable land, applied to the Deputy Collector to set aside or re-open the partition. A objected, denying that there was any inequality. The Deputy Collector, after inquiry, thought that there was; and, because A persisted in denying it, ordered an interchange of lots. No question of fraud was raised or inquired into. It was held that the Deputy Collector had no power to order an interchange of lots, and that the Civil Court had jurisdiction to restore A to the possession of the land which had at first been assigned to him (*Desráj* v. *Dhuni*, 7 N.-W.-P. Rep. 9).

As a general rule, the Revenue Courts have exclusive jurisdiction in matters connected with the settlement and collection of the land revenue. Where, however, land had been resumed and settled with one person, it was held, that another person, who considered himself entitled to have the land settled with him, could sue in the Civil Court to obtain a declaration of his right to such settlement (*Mahomed Israil* v. *Wise*, 13 B. L. R. 118: *Ramchandra Saha* v. *The Collectors of Maimensingh and Pubna*, 22 W. R. 48). Section 3 of Bombay Act III of 1863 excludes the jurisdiction of the Civil Courts in respect of claims against Government on account of *Inams*, in other words, claims referring to total or partial exemption from the payment of Government revenue; but it does not deprive the Civil Courts of jurisdiction in respect of claims to recover possession of *Inám* lands (*Shidmal Gúrú* v. *Anderson*, 11 Bom. H. C. Rep. 39). When the Revenue authorities in Bengal, *acting within the jurisdiction* conferred on them by law, sell a revenue-paying estate for arrears

of Government revenue or other demand recoverable in a similar manner, the Civil Courts have no jurisdiction to interfere, and any application for the reversal of a sale on the ground that it has not been conducted in accordance with the provisions of the law must be made by way of appeal to the Revenue Commissioner (section 25, Act XI of 1859); and no such sale shall be annulled by a Civil Court except on the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plaintiff has received substantial injury by the irregularity complained of, which must further have been specified in an appeal to the Commissioner (section 33, Act XI of 1859). These provisions have, however, no application, and the Civil Courts have power to reverse a sale when it has been made wholly *without jurisdiction* on the part of the Revenue authorities, as, for example, when there was no legally sufficient arrear of revenue (*Baijnath Sahú* v. *Lalla Sithal Persad*, 2 B. L. R. F. B. 1, and 10. W. R. F. B. 66, overruling *Umesh Chandra Chatterji* v. *The Collector of the 24-Pergunnahs*, 8 W. R. Civ. Rul. 439; *Jai Dúrga Debya* v. *Gopal Chandra Bannerji*, 9 W. R. Civ. Rul. 538; *Mohan Ram Jha* v. *Sib Dutt Singh and others*, 8 B. L. R. 230 (Act VII (B. C.) of 1868); *Jokí Lall* v. *Nursingh Narain Singh and others*, 4 W. R. Act X. Rul. 5, and *Khúnú and others* v. *Aodal Singh and others*, 8 W. R. Civ. Rul. 511 (Sale of land not within Collector's jurisdiction): and see *Nawáb Sidhí Nazir Alí Khan* v. *Ujúdhyaram Khán*, 10 Moo. Ind. Ap. 540). The last case raised the question of fraud. The Civil Courts have jurisdiction to reverse a sale of a *patní* tenure made by the Revenue authorities, when the requirements of the law, Regulation VIII of 1819, have not been complied with (*Krishno Mohan Saha and others* v. *Munshí Aftabudín Mahomed and others*, 8 B. L. R. 134: *Beihanth Nath Singh and others* v. *Maharajah Dheraj Mahatab Chand Bahadúr and others*, 9 B. L. R. 87: *Sarúp Chandra Bhúmick* v. *Rájá Pertab Chandra Singh*, 7 W. R. Civ. Rul. 219, and 3 R. C. and C. R. Civ. Rul. 148). As to the jurisdiction of the Civil Courts to reverse sales made by the Revenue authorities under section 105, Act X of 1859, and under Act VIII (B. C.) of 1865, see *Mea Jan Munshí* v. *Kurrimamayí Debya*, 8 B. L. R. A. C. 1 (Here the real tenant was not made a party to the suit for arrears of rent, in execution of the decree obtained in which the tenure was sold): *Jan Alí* v. *Jan Alí Chaudhrí*, 1 B. L. R. A. C. 56 (Fraud, &c.): *Rattan Maní Dasí* v. *Kalikissen Chakravarttí and others*, W. R., 1862—1864, Spec. No. 147: *Pran Bandhú Sirkar* v. *Sarbasandarí Debya*, 3 B. L. R. Civ. Ap. 52, note: *Sadhan Chandra Bose* v. *Gúrú Charan Bose and others*,

Sales for arrears of land-revenue, &c.

8 B. L. R. 6, note: *Haranund Dutt* v. *Ram Dhun Sen*, W. R. Jan.—July, 1864, Act X Rul. 122: *Mahomed Fazal* v. *Umakanth Sen*, 1 W. R. Civ. Rul. 159: *Jageshir Sahai* v. *Gopal Lal and another*, 11 W. R. 260: *Jaikissen Mukherji* v. *Harihar Mukherji*, 9 W. R. 286: *Sarúp Chandra Bhattacharjya* v. *Kashishari Dasi and others*, 6 W. R. Act X Rul. 55: *Ram Sundar Paramanick* v. *Prosonno Kumar Bose*, 5 W. R. Act X Rul. 22.

Separation of Shares of Revenue-paying Estates: sections 11 and 12, Act XI of 1859.

Under the provisions of section 11 of Act XI of 1859, when a *recorded* sharer of a joint estate, whose share consists of a specific portion of the land of the estate, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to this effect, and the Collector is authorized to deal therewith. If, however, any recorded proprietor of the estate, whether the same be held in common tenancy or otherwise, object that the applicant has no right to the share claimed by him, or that his interest in the estate is less or other than that claimed by him, or that the amount of revenue stated in the application to be payable on the share is not the true amount, the Collector shall refer the parties to the Civil Court, and shall suspend proceedings until the question at issue is judicially determined (section 12). If any such objection be made, and the Collector proceed notwithstanding to deal with the application for separation of shares, he acts without jurisdiction, and the Civil Court, on a suit being brought for this purpose, will set aside his proceedings (*Madan Mohun Mazimdar* v. *Baistab Charan Mandal and others; Púrna Chandra Gangúli* v. *Madan Mohan Mazimdar*, 6 B. L. R. 617, note). In the case of *Har Gobind Das and others* v. *Baroda Persad Das* (6 B. L. R. 615) an objection had been made on the part of the plaintiff, when a minor, to an application for separation of shares made by two persons. This objection alleged, amongst other things, that plaintiff was the proprietor of a four-anna *joint* share. If this allegation were true, the persons who had applied for separation of shares could not be sharers, *whose shares consisted of a specific portion of the land of the estate.* The objection, therefore, went to the very foundation of the Collector's jurisdiction. It was rejected on the ground that the plaintiff was not recorded as a sharer in the Collector's rent-roll. The plaintiff then brought a suit in the Civil Court for a declaration of his title and share and to set aside the proceedings of the Collector. It was held that he was entitled to the redress which he sought; and it was observed that otherwise the plaintiff would be without a remedy, the Collector being unable, as the law stands, to afford any remedy as the plaintiff was not a *recorded* sharer.

Court of Wards.

The Civil Court has no jurisdiction to entertain a suit against the Court of Wards (see Bengal Regulation X of 1793, and Act IV (B. C.) of 1870) to restrain that Court from carrying into effect an order passed by the Board of Revenue directing that a minor be sent to Calcutta to be educated at the *Wards' Institution*, the interposition of the Civil Court being claimed on the ground that the minor's health would be seriously injured by his being brought to Calcutta, and that the Board of Revenue had no authority to reverse an order made by the Commissioner as to the place where the minor should be educated (*The Collector of Birbhúm* v. *Mandakini Debya*, W. R. Jan.—July, 1864, Civ. Rul. 332). The Civil Courts have no power to question or interfere with arrangements made by the Court of Wards as to the remuneration of a manager of an estate under its charge (*Rani Sharat Sun lari Debya* v. *The Collector of Maimansingh*, 7 W. R. Civ Rul. 221). The High Court refused to interfere to restrain the same Court in the matter of the bestowal in marriage of a female minor (*Gaujádhar Persad Narain Singh, Petitioner*, 5 W. R. Mis. Ap. 41). A certificate of administration granted by the Civil Court, appointing a guardian under Act XL of 1858, cannot debar the Court of Wards from taking the infant and the estate under its management, when legally empowered so to do (*Madhú Súdhan Singh* v. *The Collector of Midnapore*, B. L. R. Sup. Vol. 199).

Jurisdiction of Revenue Courts as to rent of Land used for agricultural purposes.

The jurisdiction of the Revenue Courts in matters connected with the rent of land used for agricultural purposes is a subject of considerable intricacy in the Bengal Presidency. Under the provisions of Act X of 1859[1] an exclusive jurisdiction was given to the Revenue Courts in the following classes of cases: *viz.*—(1) suits for the delivery of *pattas* (leases) and *kabúliyats* (counterparts of leases) or for the determination of the rates of rent at which they are to be delivered: (2) suits for damages on account of the illegal exaction of rent or of any unauthorized cess or import, or on account of the refusal of receipts for rent paid, or the extortion of rent by confinement or other duress: (3) complaints of excessive demand of rent and claims to abatement: (4) suits for arrears of rent of land, *kheraji* (revenue-paying) or *lakheraj* (exempt from revenue), or of rights of pasturage, forest rights, fisheries, or the like: (5) suits to eject any *raiyat*

[1] An account of the manner in which this jurisdiction was variously exercised by the Civil and Revenue Courts before the passing of Act X of 1859 will be found at page 162 of the author's *Introduction to the Bengal Regulations*.

or cancel any lease for non-payment of rent or breach of contract: (6) suits to recover possession of any land, farm or tenure from which the tenant has been illegally ejected by his landlord: (7) suits connected with the exercise of the power of distraint by landlords: (8) suits by landlords against agents employed in the management of land or collection of rents, or their sureties, for money received or accounts kept in the course of such employment (sections 23, 24). If a landlord requires assistance to eject a cultivator not having a right of occupancy or a farmer or other tenant after the determination of his lease or tenancy, or an agent after the determination of his agency, or to enforce any attachment or ejectment expressly authorized by law, section 25 enacts that he shall apply to the Collector, who shall proceed to inquire into the case and pass orders in the manner provided for suits under the Act. The Revenue Courts were further empowered to enforce the measurement of land by persons entitled to the rent thereof (section 26: see also sections 9, 10, 11, of Act VI (B.C.) of 1862). Landlords were deprived of the power of summarily dispossessing the holders of *lakheraj* land, the grant of which had been made after the decennial settlement: and were required in future to make application to the Collector, who was directed to deal with such applications as suits under the Act. Speaking generally, the decision of the Revenue Courts is final and conclusive on matters which fall properly within their jurisdiction as regulated by this Act,[1] and which form the subject of a suit judicially tried, in which an appeal lies to the District Judge (*Umacharan Dutt* v. *J. Beckwith*, 1 R. C. and C. R. Civ. Rul. 58; S. C. 5 W. R. Act X Rul. 3: *Sonatan Rai and another* v. *Ananda Kumar Mukherji and others*, 2 B. L. R. App. 31: *Mussamat Edan* v. *Mussamat Bechan*, 8 W. R. Civ. Rul. 175; S. C. 2 Jur. N. S. 264). Here Peacock, C. J. said:—"It is clear that the Judge had no power, as a Court of original jurisdiction, to try the question whether the rent was due or how much was due, because that jurisdiction was taken away from the ordinary Courts of Judicature by Act X of 1859, and transferred to the Revenue Courts, and they were made the sole and exclusive Courts for the purpose of trying suits for rent." But though they may incidentally decide a question of title for the purpose of a suit

Decisions of Revenue Courts under Act X of 1859 how far conclusive.

[1] As to whether a suit must be preferred in the Revenue Court of the Subdivision in which the cause of action arose, see *Mackintosh* v. *Kashinath Biswas*, (21 W. R. 450) which decided that if not so preferred, but brought in the Revenue Office of the district, the decree is not absolutely void, but voidable only at the instance of the defendant.

for rent, the decision thereupon will not be conclusive so as to bar the same question from being raised and tried in the Civil Court (*Dhonei Mandal* v. *Arif Mandal*, &c. 9 W. R. 306: *Khagauli Singh* v. *Hosen Baksh Khan*, 7 B. L. R. 673: *Lakhi Narain Mittra* v. *Khetro Pal Singh Rai*, 13 B. L. R. 158: *Hari Sunker Mukherji* v. *Muktaram Potro*, 15 B. L. R. 238).

Question, whether Revenue Court or Civil Court has jurisdiction.

The question whether the Revenue Court under Act X of 1859 or the Civil Court has jurisdiction, has been raised and decided in a large number of cases. In order to determine this question where it arises, it is, generally speaking, necessary to look at the cause of action stated in the plaint and the remedy sought by the plaintiff, and not merely at the defence set up by the defendant (*Watson & Co.* v. *Hedger*, W. R. Jan.—July, 1864, Act X. Rul. 25: *Nabin Chandra Rai Chaudhri* v. *Bhawani Persad Dass*, *id.* 52: *Gobind Chandra Mazimdar* v. *Bissambheri Dasi*, 2 W. R. Act X, Rul. 5: *Hari Nath Dass* v. *Asmat Ali*, 6 B L. R. App. 118: *Dayal Chandra Ghose* v. *Dwarkanath Mittra*, W. R. Spec. No. 47). When a suit is brought in the Revenue Court on the allegation of the existence of the relation of landlord and tenant, and this relation is denied, the Court should first judicially decide the issue so raised and take jurisdiction accordingly (*Hari Persad Mali* v. *Kunjo Behari Saha and others*, W. R. Spec. No. 29).

Some decided cases in which the Revenue Courts have been held to have jurisdiction.

In the following cases the Revenue Courts were held to have jurisdiction:—where *abatement* of rent was claimed, as also a *refund* of excess rents paid for land said to have been diluviated (*Barry* v. *Abdúl Ali*, W. R. Jan.—July, 1864, Act X. Rul. 64: but see *Madhab Chandra Bidya Rattan* v. *Tara Sundari Gupti*, 2 W. R. Act X. Rul. 92):—where a *refund* was sought of so much of the rent as issued out of a portion of the land demised, the possession of which the plaintiff alleged had not been given to him (*Sarba Chandra Dass* v. *Umanand Rai*, 11 W. R. 412; and see *Prosono Mayi Dasi* v. *Súndar Kumari Debya*, 2 W. R. Act X. Rul. 30):—in a suit for *arrears* of the rent of a *hât*, the land upon which the *hât* was established being the subject of the demise (*Gaitri Debya* v. *Thakûr Das*, W. R. Jan.—July, 1864, Act X. Rul. 78):—in a suit for arrears of rent brought against the *surety* of the *lessee* (*Bhúban Mohan* alias *Prolad Sandyal* v. *Bhúleo Sundari Debi Chaudhrain*, 8 W. R. 452):—in a suit to *cancel a lease* on account of the breach of the conditions thereof, and for arrears of rent (*Rani Belsari Kúmári* v. *Subran Singh*, 2 W. R. Act X Rul. 12: *Ram Chandra Dutt* v. *Din-*

diyal Poramanick, id. 16):—for *abatement* of the rent of a *patní talúk* (*Ramnarain Banerji and others* v. *Jaya Krishna Mukherji*, B. L. R. Sup. Vol. F. B. 70: *Man Garobani Dasi* v. *Khetar Chandra Ghose*, 2 W. R. Act X Rul. 47):—for arrears of rent *assigned*, in a suit by the *assignee* (*Kishan Kúmar Mitter* v. *Mahesh Chandra Banerji*, W. R. Jan.—July, 1854, Act X Rul. 3: *Shama Sundari Dasi and others* v. *Bindaban Chandra Mazimdar*, Marsh. Rep. 199: see also *Ashutosh Chakravartti* v. *Bani Madhab Mukherji*, 5 W. R. Act X. Rul. 34):—so when payment to the assignee was pleaded to a suit by the landlord (*Purna Chandra Rai* v. *Nand Lal Ghose and others*, 7 W. R. 25):—where the defence was that the tenant had lent money to his landlord on a bond which stipulated that a portion of the rent should be applied in satisfaction of this debt (*Mussamat Edan* v. *Mussamat Bechan*, Marsh. Rep. 409: *Eshan Chandra Sen* v. *Kenaram Ghose and others*, 12 W. R. 381):—in a suit for an illegal distress upon an under-tenant by the superior landlord of his lessor (*Gholam Alí* v. *Nanda Za*, Marsh. Rep. 264):—for the *value of a number of mangoes*, which it was stipulated in the *kabúlyat* should be supplied yearly, such stipulation being held to be really for the payment of a part of the rent in kind (*Naba Tarini Dasi and others* v. *Gray*, 11 W. R. 7):—for the rent of *land held in excess* of the demise, there being no express contract in a written lease defining the lands to which the tenancy extended (*Sham Jah* v. *Durga Rai and others*, 7 W. R. 122; see also *Raj Mohan Bose* v. *Issur Chandra Saha*, 6 W. R. Act X Rul. 19):—for a kabúliyat for a *fishery* (*Kailass Chandra Dey* v. *Jai Narain Jalua and others*, 7 W. R. 193):—or to *enhance* the rent of a *fishery* (*Paran Santra* v. *Tajudín*, 5 W. R. Act X Rul. 20):—a suit for the *recovery of possession* by a raiyat having a right of occupancy, illegally ejected by his *zemindar* (*Ram Bhajon Bhakat* v. *Ketai Ram Chaudhri and others*, 6 W. R. Act X Rul. 21: *Khajah Asanúla* v. *Abhai Chandra Rai*, 13 Moo. In. Ap. 317):—or to recover *possession of land with a hut* upon it, the hut being a mere appendage and matter of accident (*Matingini Dási* v. *Haradhun Das*, 5 W. R. Act X Rul. 60). Proceedings under section 28 of the Act to dispossess persons claiming to hold land free of revenue are a suit, in which the decision of the Collector is appealable to the District Judge (*Bishambhur Misser and others* v. *Ganpat Misser*, B. L. R. Sup. Vol. F. B. 5). This section is concerned with alleged *lakheraj* lands, the tenure of which is said to be invalid by reason of the grant being made after the 1st December, 1790 (section 10, Ben. Reg. XIX of 1793: *Múrúbhi Sahú* v. *Latú Kúmár* alias *Dyebutti Kumar and others*, W. R. Spec. No. 70: *Maháraní Inderjit Kunwar* v. *Chokú Sahú*, W. R. Spec. No. 81: S. C. B. L. R. Sup. Vol.

Lakheraj Lands.

F. B. 1: *Sheikh Saheb Ali and others* v. *Lalla Bissessur Lal*, 1 W. R. Civ. Rul. 111). In respect of these alleged *lakheraj* grants, the Revenue Courts and Civil Courts have a concurrent jurisdiction (*Sonâtan Ghose and others* v. *Múlvi Abdûl Ferar*, 2 W. R. Civ Rul. 91: S. C. B. L. R. Sup. Vol. F. B. 109; approved by the Privy Council in *Harihar Múkhapadhya* v. *Madhab Chandra Babú, and Nuba Krishno Mukkapadhya* v. *Kailas Chandra Bhattacharjya*, 8 B. L. R. 576).[1]

Decided cases in which the Civil and not the Revenue Courts have been held to have jurisdiction.

In the following cases it has been decided that the Civil and not the Revenue Courts have jurisdiction:—where plaintiff sued to eject the defendant as a *trespasser* and the defendant pleaded that he was the plaintiff's tenant (*Nabin Chandra Rai Chaudhrí* v. *Bhawaní Persad Das*, W. R. Jan.—July, 1864, Act X. Rul. 52: *Gobind Chandra Mazimdar* v. *Bissambheri Dasí*, 2 W. R. Act X. Rul. 5):—where one raiyat sued another raiyat for *possession*, and the zemindar had nothing to say to the case, except that he was called as a witness (*Radhanath Mazimdar* v. *Parikhit Badrik*, W. R. Jan.—July, 1864, Act X, Rul. 60: *Kali Das Banerjí* v. *Bonomali Das*, *id.* 61: *Mufazzal Hosen* v. *Tasúdak Ali Khan*, *id.* 89: *Watson & Co.* v. *Lal Mahomed Bishwas*, Sev. Aug.—Dec. 1863: *Telak Chand Oswal* v. *Gaur Chandra Saha*, 2 W. R. Act X. Rul. 100):—and generally when the dispossession is the act not of the landlord but of a third party (*Mussamat Amirta* v. *Nando Kishore*, 3 N.-W.-P. Rep. 333: *Mahomed Jahkí* v. *Gopi Rai and others*, 10 W. R. 5—here the landlord was made a co-defendant with third parties; and so *Srikant Chaúdhrí* v. *Kitabúdín Sirdar and others*, 10 W. R. 49: *Magní Raj* v. *Lal Khuní Lal*, 11 W. R. Act X. Rul. 19):—in a suit for a perpetual *patta* (*Kailash Chandra Dey* v. *Kailash Chandra Sen*, W. R. Jan.—July, 1864, Act X. Rul. 84:—where the *right to collect* rents as a sharer or joint owner of the estate was the point in issue (*Haro Chandra Rai* v. *Obhai Chandra Sirkar*, 2 W. R. Act X. Rul. 72):—a suit for *specific performance* of the conditions of a lease (*Abdúl Ganí* v. *Gúdri Rai*, 3 N.-W.-P. Rep. 192: *Ahmed Khan* v. *Mussamat Gúmaní Begum*, 2 N.-W. Rep. Civ. Rul. 181; *Madhab Chandra Sirkar* v. *Benod Mohun Chaudhrain*, 2 Sev. 752):—or of an agreement to give a lease (*Bharat Chandra Sen* v. *Achím-u-dín*, 2 R. C. and C. R. 207):—or for the restoration of the land to its original condition by the *removal of trees* planted contrary to the terms of the demise (*Jona Singh* v. *Neaz Begum*, 3 N.-W.-P. Rep. 183):—

[1] The whole of the cases connected with *lakheraj* tenures will be found at pp. 245—260 of the Author's edition of the *Bengal Regulations*.

or for a declaration of a raiyat's *right to cut and make use of trees* on the borders of his holding (*Pachúa* v. *Mahomed Jala Asadúla*, 2 N.-W.-P. Rep. Civ. Rul. 217):—in a suit for declaration of right to the produce of trees planted by a person whose interest the plaintiff had purchased (*Ramzanalí* v. *Syud Anwar Alí*, 11 W. R. 52):—in a suit to enforce an alleged right to erect *golahs* at certain *ghâts* and collect dues from persons using them (*Furlong* v. *Jaharí Lal*, Marsh. Rep. 194):—in a suit to set aside a *lease* as being granted *without authority* (*Taja Mahomed Pardhan* v. *Jogendro Deb Raikat*, 8 W. R. Act X. Rul. 368):—in a suit having for its object the relinquishment of a lease taken for a definite term on the ground that the lessee was induced to take it by *fraud* and *misrepresentation* (*Bholanath Khan and others* v. *Ram Sirkar*, 7 W. R. Civ. Rul. 62):—or for *damages* under similar circumstances (*Nilmaní Singh and others* v. *Issur Chandra Ghosal*, 9 W. R. 92):—or to *set aside a kabuliyat* on the ground that it is a *forgery* (*Shah Mahamúd Laskar* v. *Pakar Khan*, Marsh. Rep. 496):—or to set aside a *patta* (*Kabírudín* v. *Kissan Dhan Chakravartti*, 3 W. R. Civ. Rul. 309):—where it was sought to make a person liable for the rent of a tenure on the allegation that it was purchased *benamí* for him, that he had a *beneficial or equitable interest* therein, and was in equity liable for the rent (*Prasanna Kúmar Paul Chaudhrí* v. *Kailas Chandra Paul Chaudhrí*, 2 Jur. N. S. 327: S. C. 8 W. R. Civ. Rul. 428, and 5. R. C. and C. R. Act X. Rul. 2: see also *Kishan Bhutan Misrain* v. *Hickey*, 11 W. R. 406, and *Mahomed Kadir* v. *Gopal Lal Thakur*, 2 Sev. 861; and distinguish *Hira Lal Bakshí* v. *Rajkishore Mazímdar and others*, W. R. Spec. No. 58, in which the Revenue Court was held to have jurisdiction, the simple question being whether one of two persons took a lease *benamí* for another, or in other words, was an agent or principal in the transaction; distinguish also *Bipin Behari Chaudhrí* v. *Ram Chandra Rai and others*, 5 B. L. R. 235):—in a suit for arrears of rent due on the *lease* of *tolls* on a canal (*Garland* v. *Rai Mohan Hazrah*, 1 W. R. Civ. Rul. 15):—or an account of an *indigo factory*, the rent issuing out of the *factory* not the land (*Addit Chandra Pal and others* v. *Kamalakanth Pal and others*, Marsh. Rep. 401):—or for an iron mine (*Khalat Chandra Ghose* v. *Minto*, 1 Jur. N. S. 426):—or for a legal *due* or *cess*[1] payable for the privilege of selling *pán* on *hát* days (*Harish Chandra Kúnd* v. *Gopal Baría*, 3 W. R. Act X Rul. 158):—a suit to recover rents wrongfully collected by a person *not the agent* of the *zemindar*, and having no

[1] As to Revenue Courts having no jurisdiction in suits to recover cesses over and above the rent, see *Arjan Sahú* v. *Anand Singh and another*, 10 W. R. 257. The whole question of cesses or *abwabs* will be *found* discussed at pages 60 61, 217, 400, 538—539, and 578 of the Author's edition of the *Bengal Regulations*.

authority from him (*Sithal Krishto Rai* v. *Gopinath Saha and others*, Marsh. Rep. 465: *Kadambini Dasi* v. *Bhagobati Charan Ghose and another*, 10 W. R. 7):—a suit to assess alleged *lakheraj* land on the ground that it is held under an invalid grant, such grant bearing date prior to 1st December, 1790 (*Mûrúbhi Sahú* v. *Latú Kúmar*, W. R. Spec. No. 70):—a suit for the ground-rent of the land occupied by a *golah* (*Dilawar Ali* v. *Debi Pershad*, 11 W. R. 203):—for *damages* for the wanton destruction of trees, even though the suit be based on a stipulation in the *kabúliyat* (*Naba Tarini Dasi and others* v. *Gray*, 11 W. R. 7):—a suit for recovery of *possession by a lakherajdar* against the zemindar in whose estate the alleged *lakheraj* land is situate, and who is averred to have illegally dispossessed the plaintiff (*Gúrú Persad Rai and others* v. *Nimei Charan Palshain*, 3 W. R. Act X Rul. 5):—a suit for *possession of an under-tenure by a person who had purchased* the same and had never obtained any real possession, the title purchased being contested (*Rájá Anandnath Rai Bahádúr* v. *Janmajai Bishwas*, 8 W. R. 240):—or for possession by a *purchaser from a tenant* whose right to transfer is denied by the zemindár (*Kanai Múlla* v. *Debnath Rai*, 3 W. R. Act X Rul. 161):—or for the recovery of possession on the expiry of an assignment of land *assigned for a term of years* as security for a loan and as the means of its re-payment (*Kheter Mohan Pal* v. *Ram Kumar Pal*, 5 W. R. Act X Rul. 2):—or for the recovery of possession of a building used as a shop, and for rent thereof (*Ram Charan Singh Khetri* v. *Meah Dhan Darzi*, 4 R. C. and C. R. 65):—a suit for the recovery of *zemindari dák* charges, though payable by the terms of a *kabuliyat* (*Rattan Mani Dasi and others* v. *Jotendro Mohan Thakur*, 6 W R. Act X Rul. 31; and see *Saroda Sundari Debya* v. *Umacharan Sirkar*, 3 W. R. S. C. C. Ref. 17):—a suit against *Shikmi talúkdars by the zemindar* to compel the payment of their *share of the revenue*, these *talúks* being separate from the zemindar's estate on the Collector's *tauji*, and the payment of revenue through him being merely a matter of convenience (*Chandra Kanth Chakravartti* v. *Jai Gopal Chakravartti and others*, 4 W. R. Act X Rul. 41; and see sections 5, 6, and 7 of Bengal Regulation VIII of 1793):—a suit to set aside a decree obtained by *fraud* in the Revenue Court (*Aughar Lal Shamant* v. *Gyanand Rai*, 6 W. R. Act X Rul. 11):—a suit by the *assignor* of a lease against his *assignee* to recover the landlord's rent which the former had to pay, the latter having agreed and failed to do so (*Radha Kishor Sirkar* v. *Jagarnath Rai Chaudhri*, 5 W. R. Act X Rul. 721):—where distraint is made by a person between whom and the defaulting tenant the relationship of landlord and tenant does not exist (*Raushan* v. *Bholanath Dass*, 5 W. R. Act X Rul. 67).

A suit for the *enhancement* of the rent of land used for building purposes is cognizable by the Civil Courts only, and the Revenue Courts have no jurisdiction (*Rani Dúrga Sundari Dasi* v. *Bibi Amdatannissa*, 9 B. L. R. 101—Full Bench: *Church* v. *Ram Tonú Saha and others*, 9 W. R. 547). Where a suit for the enhancement of the rent of such lands was brought in the Civil Court under the provisions of Act VIII (B. C.) of 1869, although upon a notice served under the provisions of Act X of 1859, it was held that the Civil Court had jurisdiction (*Brajanath Kundu Chaudhri and others* v. *Lowther*, 9 B. L. R. 121). Whether a suit to recover the *arrears* of rent of land occupied by buildings can be tried by the Revenue Courts depends upon the circumstances of the particular case. In the case of *Mathuranath Kúndú* v. *Campbell* (9 B. L. R. 115, note), Norman, J. said: "If the principal subject of the demise, that for which substantially the rent is reserved, is land, I think it matters not that the value is increased by houses or other buildings standing upon the land. This Court so held in *Tarini Persad Ghose* v. *The Bengal Indigo Company*" (2 W. R., Act X Rul. 9). . . . . "On the other hand, where the principal subject of occupation is a building or buildings, when the rent is substantially the price of the use and occupation of such building or buildings, the land on which the buildings stand being a merely subordinate matter, it may well be that the rent for such buildings cannot be truly described as 'the rent of land either *kheraji* or *lakheráj*.' The cases of *Maharajá Dheráj Mahtab Chand Báhádúr* v. *Mahund Ballabh Bose*,[1] *Bipro Das Dey* v. *Woollen*,[2] and *Hari Mahun Sirkar* v. *Moncrieff*,[3] fall apparently within this class of cases." In the first of the three cases here referred to, the demise was that of a *bazár*, and the rent issued out of the buildings as well as the land. Similarly, in the last of the three cases the demise included *arháts, ghâts, háts, and bazárs*. See also *Watson & Co.* v. *Gabind Chandra Mazimdar*, W. R. Jan.—July, 1864, Act X Rul. 46: *Kali Kishen Bishwas*, v. *Srimati Janki*, 8 W. R. Civ. Rul. 250: *Rani Surnamayi* v. *Blumhardt*, 9 W. R. Civ. Rul. 552: *Ram Charan Singh Ketri* v. *Meadhan Darzi*, 8 W. R. Civ. Rul. 90: *Kali Mohan Chatterji* v. *Kali Krishna Rai Chaudhri*, 2 B. L. R. App. 39: and *Shalgram* v. *Mussamat Kabiran*, 3 B. L. R. 61.

Rent of Lands occupied with Buildings.

A suit to recover possession of land with *mesne* profits from a person alleged to be a trespasser by reason of his having refused to surrender

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[1] 9 B. L. R. App. 13. [2] 1 W. R. Civ. Rul. 223.
[3] 9 B. L. R. App. 14.

the land after the determination of his tenancy, is one in which the Civil Courts have jurisdiction, and a plea by the defendant that he is in respect of part of the lands a permanent raiyat does not affect the question (*Hari Nath Das* v. *Asmat Ali*, 6 B. L. R. App. 118: *Ram Lochan Das* v. *Mangal Sheikh*, W. R. Jan.—July, 1864, Act X Rul. 3: *Ram Gopal Mazimdar* v. *Sanders*, 1 W. R. Civ. Rul. 139: *Ram Chand* v. *Chandi Charan Dass*, *id.* 161: *Rai Udit Narain Singh* v. *Ram Saran Rai*, *id.* 221: *Bidhúbúdín Mukherji* v. *Dúrga Maní Debya*, 2 W. R. Civ. Rul. 157: *Makújú Nashya* v. *Dahar Mahomed*, *id.* 52: *Pír Mahomed and another* v. *Chandrabati Chaudhrain and others*, 7 W. R. Civ. Rul. 155: *Padamani Dasi* v. *Jholla Pally and others*, *id.* 283: *Sirbeshir Dey and others* v. *Fakír Mahomed*, *id.* 243: *Tarachand Targar* v. *Loknath Dutt and others*, 7 W. R. 414: *Hari Nath Das* v. *Asmat Ali*, 6 B. L. R. App. 118).

Suits to recover possession of Land with *Mesne* Profits.

A suit for declaration of *title* under a *maurasi* lease is cognizable by the Civil not by the revenue Courts (*Bissambher Boit* v. *Okúr Panday*, 4 W. R. Civ. Rul. 105). A suit by the purchaser of a transferable tenure for a declaration of his title and to recover possession is cognizable by the Civil, not by the Revenue Court: and generally where a person claiming a tenure sets out his title and seeks to have his right declared and possession given him in pursuance of that title, the Civil Court has jurisdiction, whether there is a claim for *mesne* profits or not (*Gúrú Das Rai* v. *Bishtu Charan Bhattacharjya and others*, 7 W. R. Civ. Rul. 187; S. C. Sup. Vol.—F. B. 628: *Nabin Kishan Mukherji* v. *Sib Persad Pattack*, 8 W. R. Civ. Rul. 96: *Rájá Anandnath Rai Bahadúr* v. *Janmajai Biswas*, *id.* 240: *Lalji Sahú and others* v. *Bhagwan Dass*, *id.* 337: *Dhoneí Mandal* v. *Aríf Mandal*, 9 W. R. 306: *Taranath Battacharjya* v. *Obhei Charan Haldar and others*, 7 W. R. 471: *Baní Madhab Banerji* v. *Jai Kissen Mukherji*, 4 W. R. Act X Rul. 17—here the relation of landlord and tenant was expressly denied; *Seodan Singh* v. *Sithal Singh*, N-W-P. S. D. A. Rep. for 1865, p. 282, The Civil Court has jurisdiction in a suit brought by a zemindar to try the question of the *mukarrarí* title set up by tenants, who, being ousted by him, had recovered possession under section 23, Act X of 1859 (*Lalla Gokul Persad* v. *Raja Rajendro Kishore Singh*, W. R. Jan.—July, 1864, Act X Rul. 4; and see *Umacharan Dutt* v. *Beckwith*, 5 W. R. Act X Rul. 3).

Where title in Dispute, although no claim for *Mesne* Profits.

A suit by one of several co-proprietors entitled to rent against his co-proprietors to recover his *share of the rents* collected by them, must be brought in the Civil Court (*Subal Singh* v. *Mita Singh*, W. R.

Jan.—July, 1864, Act X Rul. 12: *Lalla Isri Persad* v. *Stuart*, *id.* 28: *Syud Heider Ali* v. *Amrit Chaudhri*, *id.* 42: *Syud Sharafat Ali* v. *Sheikh Ramzan*, *id.* 53): and so also a suit by one co-sharer for the rent of land held by another co-sharer (*Mittar Lall Sahú* v. *Sheikh Nadar*, 1 W. R. Civ. Rul. 53). But a suit by a *lambardar* for his share of the profits against another *lambardar* in the North-West Provinces is cognizable by the Revenue Court under Act XIV of 1863 (*Mahomed Gous* v. *Mussamat Kariman Nissa*, 1 N-W-P. Rep. Rev. Rul. 52; and see also *Zakal Dass* v. *Balmokand*, N-W-P. S. D. A. Rep. for 1864, p. 592).

Suit against a co-proprietor for share of the rent.

A decision by a Revenue Court under clause 6, section 23, Act X of 1859, turns merely on the question of illegal dispossession and is not a bar to a regular suit in the Civil Court to try the question of title (*Súrjí Kant Rai* v. *Forlong*, 1 In. Jur. N. S. 382). In the case of *Chandra Kúmar Mandal*, *&c.* v. *Namní Khanum* (11 B. L. R. 434; S. C. 19 W. R. Civ. Rul. 322). A brought a suit against B in the Revenue Court under clause 6, section 23 of Act X of 1859, to recover possession of certain land which he alleged that he held under a *maurasí* or hereditary lease, and from which he said he had been dispossessed by B in execution of a decree. B denied the genuineness of the *maurasí* lease, which was put in issue and found by the Deputy Collector to be genuine. B subsequently brought a suit in the regular Civil Court to recover possession of the land covered by the lease, and it was held by a Full Bench of the Calcutta High Court that the previous decision as to the lease was not conclusive between the parties. An order of the Revenue Court refusing assistance under section 25, Act X of 1859, in ejecting a raiyat or farmer is not a bar to a civil suit (*Gokul Chandra* v. *Ali Mahomed*, 10 W. R. 6); nor will an order under the same section granting such assistance be a bar (*Amanat Ali Chraudhrí* v. *Mosen Ali*, 2 B. L. R. App. 36; see also *Harí Nath Das* v. *Tarachand Sirkar and another*, 10 W. R. 295, and *Madan Mohun Roi* v. *Gaur Mani Gúpto*, B. L. R. Sup. Vol. F. B. 31). In fact, an order passed under this section has in no respect the force of a judgment or decree (*Philip* v. *Sibnath Moitra*, B. L. R. Sup. Vol. F. B. 21; see also *Kishen Jiban Rai* v. *W. Ramey*, 3 W. R. Civ. Rul. 205.) Proceedings under section 27, Act X of 1859, for the registry of *talúks* and other tenures are not proceedings in a suit so as to be a bar to a regular suit in the Civil Court (*Chandra Narain Ghose* v. *Kasinath Rai Chaúdhrí*, 4 B. L. R. F. B. 43, overruling *Mahomed Núr Buksh* v. *Mohan Chandra Poddar and others*, 6 W. R. Act X. Rul. 67; also *Madhab Chandra Pal* v. *Hills*, 1 B. L. R. Civ. Rul. 175; S. C. 10 W. R. 197).

The jurisdiction to try cases connected with the rent of land used for agricultural purposes was again transferred in 1869 from the Revenue to the Civil Courts by Act VIII of the Bengal Council, *i. e.* so far as concerns those districts in the provinces subject to the Lieutenant-Governor of Bengal, to which this Act has been or may be extended by an order published in the *Calcutta Gazette* under the provisions of section 106. When the Act takes effect in this manner, the Collectorate Courts under Act X of 1859 cease to exercise jurisdiction, and all suits, which would have been cognizable by such Courts under this Act, become cognizable by the Civil Courts. The above decisions, which turn upon the limited nature of the jurisdiction of the Revenue Courts, have no application to the proceedings of a Civil Court trying a case under Act VIII (B. C.) of 1869. The Civil Court in such a case exercises the same jurisdiction as in other cases, and its decision on a matter properly raised and tried is final and conclusive between the parties (*Mahima Chandra Mazimdur, &c.* v. *Asradhi Dasia*, 21 W. R. 207). A Civil Court ought not to refuse to entertain a prayer for relief, which falls within its ordinary jurisdiction, merely because the suit had been registered as a suit under Act VIII (B. C.) of 1869 (*Anand Mayi Dasi* v. *Rai Mani Dasi, &c.* 20 W. R. 14).

Act VIII (B. C.) of 1869. Jurisdiction in rent cases transferred to the Civil Courts in the Lower Provinces.

In so far as regards the territories for the time being under the Government of the Lieutenant-Governor of the North-Western Provinces, Act X of 1859 has been repealed by section 2 of Act XVIII of 1873, which however re-enacts its substantial provisions in an amended form, so that in this portion of the Bengal Presidency the Revenue Courts still continue to exercise exclusive jurisdiction in matters connected with land used for agricultural purposes and the rent thereof. It would exceed my present limits to complete the subject with exact information for all the territorial divisions of the country: but I may say that, speaking generally, the jurisdiction of the Revenue Courts in these matters is the rule, and that of the Civil Courts the exception.

Act XVIII of 1873. "The North-Western Provinces Rent Act."

The constitution of Courts of Small Causes in the Presidency Towns is regulated by Acts IX of 1850, XX of 1857, XXVI of 1864, and VI (Bom. C.) of 1864. The jurisdiction of these Courts extends to the recovery of any debt, damage, or *demand* (and this includes suits for the recovery of immovable property—*Walji Karimji* v. *Jaganath Premji*, I. L. R. 2 Bom. 84) not exceeding the sum of one thousand rupees, and to all actions in respect thereof except suits for

Courts of Small Causes in the Presidency Towns.

libel, slander, matters connected with the revenue or acts done under the authority of Government or of judicial officers, provided that the cause of action have arisen or the defendant at the time of bringing the action dwell or carry on business or personally work for gain within the local limits of the jurisdiction of the Court. When the sum to which the plaintiff is entitled exceeds one thousand rupees, he may abandon the excess in order to sue in the Court of Small Causes; but if the abandonment be not made beforehand and stated in the summons, the Court has no jurisdiction (*Gorachand Chandra Bose* v. *Charro Chandra Ghose*, 1 Cor. Rep. 93). Where both parties agree by a memorandum signed by them or by their attorneys, these Courts have power to try any action in which the debt or damage claimed, or value of the property in dispute, whether on balance of account or otherwise, exceeds one thousand rupees (see sections 2, 3, and 4 of Act XXVI of 1864, and sections 25 of Act IX of 1850). When a person claimed as damages sums which by law he could not recover, and to which he could not be entitled at all; and it was found that he had added such sums to his claim in order to make the total amount exceed Rs. 500 and so make such claim cognizable by the Small Cause Court under section 2, Act XXVI of 1864, it was held that the Small Cause Court had no jurisdiction and that jurisdiction could not be created in this way (*Bonomali Naun* v. *T. Campbell*, 10 B. L. R. 193; S. C. 19 W. R. Civ. Rul. 21). The principle of this decision would apply to any Court, the jurisdiction of which is subject to a pecuniary limit.

Presumption as to Jurisdiction.

It is a rule in England that nothing shall be intended to be out of the jurisdiction of a *superior* Court but that which specially appears to be so, and that nothing is intended to be within the jurisdiction of an *inferior* Court but that which is expressly alleged. Where, therefore, it appears upon the face of the proceedings that an inferior Court has jurisdiction, it will be presumed that the proceedings are regular; but if it do not so appear, if it appear affirmatively that the inferior Court has no jurisdiction, or, if it be left in doubt whether it has jurisdiction or not, no such presumption will be made. It is necessary, therefore, for a party, who relies upon the decision of an inferior tribunal, to be prepared to show that the proceedings were within its jurisdiction.[1] This rule as to jurisdiction has been quoted

[1] See *Peacock* v. *Bell*, 1 Saunder's Rep. by Williams 74; *Gosset* v. *Howard*, 10 Adolphus and Ellis, Queen's Bench Rep. 45; *Kinning* v. *Buchanan*, 8 Common Bench Rep. 286; *Dempster* v. *Purnell*, 4 Scott's New Rep. 39; and *Stanton* v. *Styles*, 5 Welsby, Hurlstone, and Gordon's Rep. 583. The jurisdiction of an inferior Court, if it do not plainly appear, may be inferred by fair and necessary intendment (*In the matter of the Commissioners for the Town of Calcutta*, 1 Boul. Rep. 565).

and followed in India (see *the Queen* v. *Nabadwip Goswami*, per Peacock, C. J. 1. B. L. R. Or. Cr. 30). The High Courts or Courts occupying a similar position in the Panjáb, &c. are probably the only Courts which in India could be regarded as superior Courts within the rule.

The consent of parties will not give to a Court a jurisdiction which it does not otherwise possess (*Kadambini Dasi and others* v. *Dúrga Charan Dutt*, Marsh. Rep. 4: *The Government of Bombay* v. *Ranmal Singji Amar Singji*, 9 Bom. H. C. Rep. 242: *Rai Bhúpendronath Chaudhri, &c.* v. *Kali Prosonno Ghose, &c.*, 24 W. R. 205: *Queen* v. *Bholanath Sen* I. L. R. 2 Calc. 24). The defendant in a suit brought in the Court of a Subordinate Judge successfully pleaded that the subject matter was overvalued. The plaintiff thereupon re-instituted the suit in the Court of a Munsif and obtained a decree. The defendant appealed, and in appeal contended that the value of the subject-matter was over Rs. 1,000, and therefore beyond the Munsif's jurisdiction and within that of the Subordinate Judge. It was held that he was barred from making this contention by his former pleading and the former judgment (*Brahmamayi Dasi* v. *Anand Chandra Chatterji*, 22 W. R. 120). A sued B in the French Court at Mahé. B made no objection to the jurisdiction and defended the suit. A, having obtained a decree, sued B thereupon in a Court in British territory. B pleaded that the Court at Mahé had no jurisdiction to make the decree: but it was decided that, having taken the chance of a judgment in his favour at Mahé, he could not be allowed to set up this plea (*Kandath Mammi* v. *Nilancherayil Abdu Kalandan, &c.* 8 Mad. H. C. Rep. 14). Explanation VI to section 13 of the Code of Civil Procedure enacts that when a foreign judgment is relied upon, the production of the judgment duly authenticated is presumptive evidence that the Court, which made it, had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction; see also section 44 *post*. The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action, and the matter involved in it; and does not depend upon what the defendant may please to assert by way of defence. It may turn out at the trial that the subject of contest between the plaintiff and the defendant is not properly represented by the form in which the plaintiff has chosen to put his claim; but the occurrence of that contingency will only render the plaintiff's suit liable to be dismissed as not proved. It will not affect the jurisdiction under which the suit, as brought by the plaintiff, fell (*Chandra Kumar Mandal and others* v. *Bakir Ali Khan*, 9 W. R. Civ. Rul. 598).

IV.—We have in the fourth place to consider in what cases the former suit must be held to have been *between the same parties or between parties under whom they or any of them claim, litigating under the same title.* The general rule is contained in the maxim—*res inter alios acta alteri nocere non debet, i. e.*, a matter transacted between one set of persons ought not to injure or affect another person. But it is reasonable that the same set of persons or persons claiming under them should be affected, bound by previous proceedings concerning the same matter. "The verdict ought to be between the same parties, because otherwise a man might be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he *or those under whom he claims*, was not at liberty to controvert."[1] There is, however, no hardship in holding that a man shall be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*,[2] and no man can, except in certain cases excepted by the Statute Law and the law merchant, transfer to another a better right than he himself possesses.[3]

Judgment conclusive only between same parties or their privies.

A decision for or against a man in one capacity, as for example, in a representative character, will not have the force of a *res judicata* for or against him when suing or sued in a wholly distinct capacity and in fact as a different person in law. A Hindú female, who had succeeded to her father's estate, transferred it to her grand-daughter by a deed in the nature of a release, reserving maintenance and other advantages to the donor. Subsequently, having quarrelled with the grand-daughter, she brought a suit to set aside this deed on the ground of non-performance of the conditions. While the case was pending in appeal, the plaintiff died and the *reversioners* were admitted to conduct the appeal in her stead. The grand-daughter subsequently died, and one of these reversioners then sued to recover the property as heir to the alienor's father. It was held that he was not estopped by the judgment in the previous case, for that the reversioners merely represented in that suit the interest of their predecessor, the life-tenant (*Mussamat Raj Kunwar* v. *Mussamat Inderjit Kunwar*, 5 B. L. R. 586). So a suit by a reversioner (who was the heir presumptive after the widow in

Litigating under the same title.

[1] Buller's *Nisi Prius* 233.

[2] "He who feels the advantage ought also to feel the burden."

[3] 2 Smith's Leading Cases, 7th ed. 789.

possession) to set aside a sale of the widow's life-estate was held to be no bar to a suit by the same person after her death to establish his rights as reversioner (*Dúrga Charan* v. *Kasí Chandra Maitrí*, Marsh. Rep. 539). In *Rama Rao* v. *Suriya Rao* (I. L. R. 1 Mad. 84) A and B were the sons, and C the widow, of the deceased *zomindar* of Tittapuram. A succeeded his father as *zamindar*, and dying was succeeded by his son D, who in 1862 brought a suit against B and C, for the purpose, *inter alia*, of impeaching the acts of the widow C, of restraining her from making illegal transfers, and obtaining the cancellation of two documents of transfer made and registered by her. D brought this suit relying on his right as reversioner to the property. As to a portion of the property the question was raised whether it formed part of the ancient *zamindari* and was merely assigned to the widow for her maintenance. No evidence was offered upon this question by either side, and it was therefore decided against D. After C's death, D sued the sons of B to recover this same portion of the property, alleging that it formed part of the ancient *zamindari*. It was held that D was estopped by the former judgment; that, although he sued in the first suit as reversioner, the widow's estate being then in existence, while in the second suit he claimed as immediate heir on the termination of the life-estate, yet the same title was the basis of the claims in both suits.

A suit for possession of immovable property with *mesne* profits brought against A and her father, and subsequently revived against A as her father's representative, was decreed against A in her representative capacity and dismissed as against her in her individual capacity. The decree-holder, in order to realize the *mesne* profits, attached and sold A's own private property notwithstanding her objections. In a suit by A for cancellation of this sale and for confirmation of possession of this her private property, it was held that A was not, in her individual capacity, a party to the suit in which execution had issued, and that she was entitled to maintain this action (*Sheikh Wahid Ali* v. *Mussamat Jamayi*, 2 B. L. R. F. B. 74). The decree in this case was affirmed by the Privy Council on appeal (11 B. L. R. 149), but their Lordships were clearly of opinion that a party in a representative capacity would be a party to the suit within the meaning of Section 11 of Act XXIII of 1861 (Section 244, Act X of 1877), so that under certain conditions his own private property might be attached and sold, though to fix him with this liability it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. See also *Haris Chandra Gupto* v. *Srimati Shahi Mala Gupti*, 6 B. L. R. 721. As to whether a plaintiff can show that the defendant on the record was really acting

benámí for him, and as to how far a decree is conclusive not only as to the rights of the parties but as to the *character* in which they sue, see *Bhawabal Singh* v. *Mahárája Rajendra Pratab Sahi*, 5 B. L. R. 321.

Trustees, executors, and administrators.

Section 437 of the Code of Civil Procedure enacts that in all suits concerning property vested in a trustee, executor or administrator, the trustee, executor or administrator shall represent the persons beneficially interested in such property; and it shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it think fit, order them, or any of them, to be made such parties. In such cases the persons beneficially interested will be bound by a decree for or against the trustee, executor or administrator. A decree honestly obtained against the Sebait of property dedicated to the service of an idol is binding upon his successor (*Golab Chand Babú* v. *Srimati Prosonno Kumarí Debí*, 11 B. L. R. 342: S. C. 20 W. R. 86: on appeal to the Privy Council, 14 B. L. R. 450; S. C. 23 W. R. 253). Their Lordships here remarked that the authority of a *sebait* appears to be analogous to that of the manager for an infant heir as defined in the case of *Hanúman Persad Panday* v. *Mussamat Babúi Manraj Kúnwarí* (6 Moo. Ind. Ap. 423): that he must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property: and that, assuming that he may incur debts or borrow money for necessary purposes, it appears to be right and reasonable that judgments obtained against a former *sebait* in respect of debts so incurred should be binding upon succeeding *sebaits*, who in fact form a continuing representation of the idol's property: before however applying the principle of *res judicata* to judgments of this character, that the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them.

Privies.

A Hindú widow fully represents the estate, and the reversionary heirs are, in the absence of fraud or collusion, bound by a judgment obtained against her in a suit in which there has been a fair trial of the disputed right (*Kattama Natchiar* v. *Rájá Mútú Vijaya Raganadha Bodha Gúrú Swamy Periya Odaya Taver* (the *Shivaganga* case), 9 Moo. In. Ap. 539: *Nabin Chandra Chakravartti* v. *Isshur Chandra Chakravartti and others* (Full Bench), 9 W. R. Civ. Rul. 505: *Nand Kúmar, &c.* v. *Radha Kuarí*, I. L. R. 1 All. 282). In *Brammai Dasí* v. *Kristo Mohan Mukherji* (I. L. R. 2 Calc. 223) the decree was held not to be binding, as there had not been a sufficient trial in the former suit. A man died leaving two sons, A and B, and his property was taken

possession of by C, who claimed under a will alleged to have been made by the deceased. A brought a suit against C to set aside the will, and made B a *pro formâ* defendant. This suit was dismissed, the will being found to be genuine. B subsequently brought a suit against C to recover his share as heir to the deceased; and it was held that this suit was not barred by the judgment in the former suit in which A was plaintiff. It was observed that B could not, in any manner, have availed himself of the decree in that suit to enforce his claim to a share of the inheritance; that he could not have appealed from that decree; and that he was, therefore, in no way bound by the findings of the Court therein (*Nabin Chandra Mazimdar* v. *Mukta Sundari Dehya and others*, 7 B. L. R. App. 38). It will be observed that, though B and C were in the first suit arrayed on different sides, there was no real contest between them, and their interests were not adverse.[1] See also *Price* v. *Khilat Chandra Ghose*, 5 B. L. R. App. 50. With these cases may well be contrasted *Deoki Nandan Rai* v. *Kali Persad and others* (8 W. R. Civ. Rul, 366), in which a certain estate, the joint property of A, B, C, D, and E, having been sold for arrears of revenue, the *surplus* sale-proceeds were in deposit in the Government Treasury. In execution of a decree obtained against A and B jointly, their share in these sale-proceeds in deposit was sold and purchased by K, who brought a suit against A and B as principal defendants, making C, D, and E *pro formâ (ikhtiatan)* or precautionary defendants, to have it declared that he was entitled to draw the share (of the money in deposit) which he had purchased. K obtained a decree without any qualification as to the rights of C, D, and E in the share, which he had claimed as belonging to A and B. C subsequently sued K to establish a mortgage over the whole estate and a lien in respect thereof upon the very sale proceeds for which K had obtained a decree. It was held that C was estopped by the decree in the first suit. It was observed that, if C's claim were well-founded, it would have constituted a good defence to the action brought by K against C and others; and that it was C's own fault, if he did not set up that defence at that time. It may be added that the interests of C and K were clearly opposed in the first suit, and that C could have appealed against the decree passed therein; see also *Nawab Mahomed Aminudin Khan* v. *Muzaffur Hossein Khan*, 5 B. L. R. P. C. 570. In the case of *Ram Tanú Acharjya* v. *Kammal Lochan Rai and another* (3 B. L. R. App. 37) a landlord sued his tenant and the tenant's

[1] See the passage quoted from *The Earl of Bandon* v. *Becher*—*Note* to section 44, *post*.

surety in the Revenue Court for rent, the surety being made a nominal party merely, and the decree being passed against the tenant alone. He afterwards sued the surety in the Civil Court on the surety-bond which had been executed by him. It was decided that this second suit was not barred by the decree of the Revenue Court. It was observed that in that Court "no issue was raised as to the surety's liability, and no decree was pronounced against him." The plaintiff was, however, held not entitled to recover the *costs* of the suit in the Revenue Court. A person, who purchased a *patni talúk* at a sale held under Bengal Regulation VIII of 1819, was held to be bound by a decree passed against the former *patnídar* (*Tara Persad Mittra* v. *Ram Nrising Mittra*, 6 B. L. R. App. 5). As to purchasers of estates sold for arrears of Government revenue, see *ante*, p. 111.

Decree unexecuted.

A decree may be good evidence or may even have the force of an estoppel as a decree *inter partes*, though it may never have been executed and its execution has become barred by limitation—*Durga Charan Chatterji* v. *Daya Mayi Dasi*, &c. 20 W. R. 243 (decree for an enhanced rate of rent held binding though no rents were ever realized thereunder): *Ram Sundari Chaudhrain* v. *Ram Persad Sadhu, &c.* 8 W. R. Civ. Rul. 288 (decree declaring the right to assess rent on land held as *lakhiraj*, held binding, though never executed, and barred by limitation): *Maharájah Birchandra Manik* v. *Ram Kissen Shaw*, &c. 14 B. L. R, 370; S. C. 23 W. R. 129 (decree barred by limitation admitted to prove rate of rent): *Mahomed Kana Meea* v. *Rum Mahomed*, 24 W. R. 254. But where, before the passing of Act X of 1859, a zemindar had obtained a decree entitling him to enhance the rent of a *talúk*, but had never executed it, so that the rent remained unchanged from the time of the permanent settlement, it was held that this decree did not prevent the *taluk* from falling under the operation of Section 15 of the Act and being secured thereby from enhancement (*Haronath Rai, &c.* v. *Gobind Chandra Dutt*, 15 B. L. R. 120). Where a decree for possession of land was never executed and became barred by limitation, it was held that a second suit could not be brought for possession of the same property unless upon a cause of action which had arisen since that decree was passed (*Mahanth Nursingh Das* v. *Munshi Kumrúdin*, &c. 20 W. R. 412).

Section 2 of Act VIII of 1859 applied to Courts of Small Causes in the Mufassil (see Section 47, Act XI of 1865). It might have been, but was not, declared applicable to Courts of Small Causes in the Presidency Towns (see Section 15, Act XXIV of 1864). A question in consequence arose in these latter Courts as to whether the principle of *res judicata* could continue to be applied by them, seeing that Sec-

tion 2 of the Indian Evidence Act repealed all rules of evidence not contained in any Statute, Act, or Regulation in any part of British India. A similar question might have been raised as to Revenue Courts sitting under the provisions of Act X of 1859, this Act containing no provisions analogous to those of Section 2, Act VIII of 1859, which section was not applicable to those Courts. In the case of the Courts of Small Causes in the Presidency Towns, the difficulty could easily have been got over by extending Section 2 of Act VIII of 1859 to them under the provisions of Section 15, Act XXIV of 1864. In the case of the Revenue Courts,[1] legislation would appear to be necessary, that is, if the difficulty really exists. It might, however, have been a good answer to the objection to say that the rule in question is not a rule of evidence, and therefore was not repealed by Section 2 of the Evidence Act, but a rule of procedure, which therefore remained untouched by the repealing provisions just mentioned. That it was so regarded by the authors of the Indian Evidence Act, there can be no doubt—see *ante*, pages 5-6. Section 13 of the new Code of Civil Procedure, Act X of 1877, now applies to Mufassil Courts of Small Causes—see Section 5 and the second Schedule of the Code. The question of its applicability to Courts of Small Causes in the Presidency Towns is apparently in the same position as that concerning Section 2 of the former Code.

Foreign judgments.

It remains to speak of the effect of foreign judgments, *i. e.* judgments of the Courts of other countries. In the case of *Bularam Gooy and others* v. *Kamini Dasi* (4 W. R. Civ. Rul. 108), the plaintiff sued on a judgment pronounced by the French Court at Chandernagore; and it was held that, if there was no reason to question this foreign judgment *upon the ground of fraud or want of jurisdiction*, or that it was unduly obtained, the Court should accept it as conclusive between the parties, and should not inquire into the merits of the case or the propriety of the decision (see also *Madhú Bibí* v. *Ram Manickya Dey*, 4 W. R. Civ. Ref. 31; and *Mahomed Ahmed* v. *Alibar Ghazi*, 10 W. R. 337). In *Mathappa Chetti* v. *Chellappa Chetti* (I. L. R. 1 Mad. 196.) A, a Hindu British subject, neither domiciled, resident, nor possessing property in the foreign state of Pudukotta, on the occasion of a casual visit drew a bill for a sum due to B, a resident of that state. B sued A on this bill in

[1] All the provisions of the Code of Civil Procedure are applicable to rent cases tried by Civil Courts under the provision of Act VIII (B. C.) of 1869—see Section 34 of this Act. The question cannot therefore arise in respect of such cases.

the Civil Court of Pudukotta; and having obtained a decree, sued A thereupon in the subordinate Court of Madura. A pleaded that the Pudukotta Court had no jurisdiction to make the decree: and this was held to be a good plea, for that the mere making of a contract within the jurisdiction of a foreign Court does not necessarily render that Court competent to adjudicate upon all the obligatory relations which flow directly or indirectly from it. The effect to be given to foreign judgments will be found discussed in the note to the Duchess of Kingston's Case, 2 Smith's Leading Cases, 7*th* ed., pp. 813—845; in Westlake's Private International Law, §§ 361-378; and in Story's Conflict of Laws, §§ 584-618. The result of the authorities seems to be that a foreign judgment will not be conclusive if it appear on the face of the proceedings that it is founded on an incorrect view of the English law, knowingly or perversely acted on—or of the law of nations—or if it offend common reason and justice—or if it be grossly defective—or if it be shown by extrinsic evidence that the Court which pronounced it had no jurisdiction—or that it was obtained by fraud—or by means clearly contrary to natural justice, as, for instance, without any notice, summons, or equivalent proceeding. As to whether a foreign judgment can be impeached on the merits, there has been very considerable doubt and conflict of opinion, which have been probably a good deal increased by arguments in which it was assumed that no distinction existed between the claim to question a foreign judgment on the merits and to question it upon the ground of fraud or want of jurisdiction, or that it was unduly obtained. There is no doubt that a foreign judgment cannot be conclusive unless it be shown to be so in the country where it was pronounced; but it appears to be now settled that where an action is brought on the judgment of a foreign or colonial Court having jurisdiction *over the parties and the subject-matter of the suit*, it cannot be impeached on the ground that it is erroneous on the merits. It may be observed that when the foreign judgment is that of a Civil Court established by the authority of the Governor-General of India in Council in the territories of any Native Prince or State, it is not necessary to bring a fresh suit thereon, as it can be executed under the provisions of Sections 223-229 of the Code of Civil Procedure.

Provisions of the Code of Civil Procedure on the subject of Foreign Judgments.

Section 14 of the Code of Civil Procedure, Act X of 1877, enacts as follows:—"No foreign judgment shall operate as a bar to a suit in British India—(*a*) If it has not been given on the merits of the case: (*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India: (*c*) if it is in the opinion of the Court before which it is produced contrary to natural justice: (*d*) if it

has been obtained by fraud: (*e*) if it sustains a claim founded on a breach of any law in force in British India." [1]

I now turn to the provisions of the Code of Criminal Procedure under which the existence of a previous judgment or order prevents a Court from holding a trial. *Nemo debet bis puniri pro uno delicto* is a maxim of natural justice; and it is also just that a person, who has been formally tried for an offence and acquitted, should not be subjected to the harassment of being tried over again for the same offence. Accordingly the plea of *autrefois convict* or *autrefois acquit*, *i. e.* of a previous lawful conviction or lawful acquittal, has always been held to be a good plea. The Indian Code of Criminal Procedure enacts (Section 460) as follows:—"A person who has once been tried for an offence and convicted or acquitted of such offence, shall, *while such conviction or acquittal remains in force*, not be liable to be tried again *on the same facts* for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under section *four hundred and fifty-five*,[2] or for which he might have been convicted under section *four hundred and fifty-six*.[3]

Person once convicted or acquitted not to be tried for same offence.

A person convicted or acquitted of any offence may be afterwards tried for any offence for which a separate charge might have been made against him on the former trial under section *four hundred and fifty-four*,[4] paragraph I.

A person acquitted or convicted of any offence in respect of any *act causing consequences which, together with such act, constituted a different offence* from that for which such person was acquitted or convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person acquitted or convicted of any offence in respect of any

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[1] The question of the conclusiveness of foreign judgments will be found discussed in the following recent English cases—*Godard* v. *Gray* (L. R. 6 Q. B. 139), where it was held to be no bar to an action on a judgment *in personam* of a Foreign Court having jurisdiction over the parties and cause, that the foreign tribunal had put a construction erroneous, according to English law, on an English contract, the mistake of English law being really a mistake as to a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings:—*Castrique* v. *Imrie* (L. R. 4 H. C. 414), where the foreign proceeding was *in rem* and was held conclusive:—*Meyer and others* v. *Ralli and others* (35 L. T. Rep. N. S. 838), where the judgment of a French Court, which was clearly wrong according to French law (which could not be a matter of fact before that tribunal), was held not to be conclusive.

[2] See *post*, page 298. [3] See *post*, page 298. [4] See *post*, page 296.

facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was *not competent to try the offence* with which he is subsequently charged.[1]

Illustrations.

(*a.*) A is tried upon a charge of *theft as a servant* and acquitted. He cannot afterwards be charged upon the same facts either with theft as a servant, with theft simply, or with *criminal breach of trust.*

(*b.*) A is tried upon a charge of *murder* and acquitted. There is no charge of *robbery*; but it appears from the facts that A committed *robbery* at the time when the murder was committed; he may afterwards be charged with and tried for robbery.

(*c.*) A is tried for an *assault* and convicted. The person afterwards dies. A may be tried again for *culpable homicide.*

(*d.*) A is tried under Section 270 of the Indian Penal Code, for *malignantly doing an act likely to spread the infection of a disease dangerous to life*, and is acquitted. The act so done afterwards causes a person permanently to lose his eyesight. A may be charged under Section 325 with voluntarily causing *grievous hurt* to that person.

(*e.*) A is charged before the Court of Session and convicted of the *culpable homicide* of B. A may not afterwards be tried for the *murder* of B on the same facts.

(*f.*) A is charged by a Magistrate of the first class with, and convicted by him of, *voluntarily causing hurt* to B. A may not afterwards be tried for voluntarily causing *grievous hurt* to B on the same facts, unless the case comes within paragraph three.

(*g.*) A is charged by a Magistrate of the second class with, and convicted by him of, *theft* of property from the person of B. A may be subsequently charged with and tried for *robbery* on the same facts.

(*h.*) A, B, and C are charged by a Magistrate of the first class with, and convicted by him of, *robbing* D. A, B, and C may afterwards be charged with and tried for *dacoity* on the same facts."

Sections 454, 455, above referred to, are as follows:—

I.—Trial of more than one offence.

454. I.—"If in *one set of facts* so connected together as to form the *same transaction*, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

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[1] Section 113 of the Presidency Magistrates' Act, IV of 1877, contains similar provisions.

II.—If a *single act* falls within *two separate definitions of any law* in force for the time being, by which offences are defined or punished, the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him, for either.

II.—One offence falling within two definitions.

III.—If *several facts*, of which one or more than one would by itself constitute an offence, form, when combined, an offence under the provisions of any law, in force for the time being, by which offences are defined or punished, a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offences, or for the offence formed by their combination.[1]

III.—Acts severally constituting more than one offence, but collectively coming within one definition.

Illustrations.

To paragraph I.

(*a.*) A *rescues* B, a person in lawful custody, and causes *grievous hurt* to C, a constable, in whose custody B was. A may be separately charged with, convicted of, and punished for offences under sections 225 and 333, Indian Penal Code.

(*b.*) A has in his possession *several counterfeit seals* with the intention of committing several forgeries. A may be separately charged with, convicted of, and punished for the possession of each seal for a distinct forgery, under section 473, Indian Penal Code.

(*c.*) A with intent to cause injury to B, *institutes proceedings* against him, knowing there is no just or lawful ground for such proceedings. A also *falsely charges* B with having committed an offence. A may be separately charged with, convicted of, and punished for two offences under section 211, Indian Penal Code.

(*d.*) A, with intent to injure B, brings a *false charge* against him of having committed an offence. On the trial, A *gives false evidence* against B. A may be separately charged with, convicted of, and punished for offences under sections 211 and 194, or 195, Indian Penal Code.

(*e.*) A, knowing that B, a female minor, has been kidnapped, *wrongfully confines her* and *detains her as a slave.* A may be separately

[1] See also sections 71 and 72 of the Indian Penal Code.

charged with, convicted of, and punished for offences under sections 368 (read with 367) and 370, Indian Penal Code.

(*f.*) A, with six others, commits the offences of *rioting*, *grievous hurt*, and of *assaulting a public servant* engaged in suppressing the riot. A may be separately charged with, convicted of, and punished for offences under sections 147, 325, and 152, Indian Penal Code.

(*g.*) A *criminally intimidates* B, C, and D at the same time. A may be separately charged with, convicted of, and punished for each of the three offences under section 506, Indian Penal Code.

(*h.*) A intentionally causes the *death of three persons* by upsetting a boat. A may be separately charged with, convicted of, and punished for three offences under section 302, Indian Penal Code.

To paragraph II.

(*i.*) A commits *mischief* by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. A commits *theft* by having severed the tree and by floating it down the river to his village, where he sells it. A may be separately charged with and convicted of offences under sections 426 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under section 379 only.

(*j.*) A *wrongfully strikes* B with a cane. A may be separately charged with and convicted of offences under sections 352 and 323 of the Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under section 323 only.[1]

(*k.*) A wrongfully *kills* a buffalo worth sixty rupees, belonging to B, and then *takes away* the carcass in a manner amounting to theft. A may be separately charged with and convicted of offences under sections 429 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under section 429 only.

(*l.*) Several stolen sacks of corn are made over to A and B, who know they are *stolen property*. A and B thereupon assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with and convicted of offences under sections 411 and 414, Indian Penal Code; but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those sections only.

(*m.*) A *uses a forged document* in evidence in order to convict B, a public servant, of an offence under section 167. A may be separately

[1] *Kaptan* v. *G. M. Smith*, 7 B. L. R. Ap. 25.

charged with and convicted of offences under sections 471 (read with 466) and 196 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those sections only.

To paragraph III.

(*n.*) A commits *house-breaking* by day with intent to commit adultery, and commits, in the house so entered, *adultery* with B's wife. A may be separately charged with and convicted of offences under sections 454 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under section 497 only.

(*o.*) A *robs* B, and, in doing so, *voluntarily causes hurt* to him. A may be separately charged with and convicted of offences under sections 323, 392, and 394 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under section 392 or 394 only.

(*p.*) A *entices* B, the wife of C, away, and then commits *adultery* with her. A may be separately charged with and convicted of offences under sections 498 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under section 497 only.

Where it is doubtful what offence has been committed.

455. If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Illustration.

A is accused of an act which may amount to either theft, receiving stolen property, criminal breach of trust, or cheating. He may be charged separately with theft, criminal breach of trust, or cheating, or he may be charged with having committed either theft or criminal breach of trust or cheating.

When a person charged with one offence can be convicted of another.

456. If in the case mentioned in the last section, one charge only is brought against an accused person, and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Illustration.

A is charged with theft. It appears that he committed criminal breach of trust or receiving stolen goods. He may be convicted of criminal breach of trust or receiving stolen goods, though he was not charged with it."[1]

As to the mode of proving a previous conviction or acquittal, section 326 of the Code of Criminal Procedure enacts as follows:—

"Where a previous conviction or acquittal is to be proved against an accused person, application shall be made to the officer in whose custody the records of such trial may be. It shall not be necessary to produce the record of the conviction or acquittal of such accused person, or a copy thereof, but an extract may be produced in proof of such conviction or acquittal if *certified*, under the hand of the Clerk of the Court or other officer having the custody of the records of the Court in which such conviction or acquittal was had, or by the Deputy of such Clerk or officer, to be a copy of the charge, finding, and sentence, as the case may be."]

Previous conviction or acquittal how proved.

41. A final judgment, order or decree, of a competent Court, in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Judgments in probate, &c. jurisdiction.

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[1] In connection with subject matter of the above sections the following cases may be usefully referred to, *viz.*: *The Queen* v. *Dwarkanath Dutt*, 2 Jur. N. S. 67: S. C. 7 W. R. Crim. Rul. 15: *The Queen* v. *Tilkú Gwala*, 8 W. R. Crim. Rul. 61: *Jagabandhú Myti* v. *Goberdhan Bera*, 4 B. L. R. Crim. Rul. 1: *The Queen* v. *Panna and others*, 7 N. W. P. Rep. 371: and see Explanation II, section 195; Explanation II, section 215; and section 212 of the Code of Criminal Procedure, Act X of 1872; and *In the matter of the petition of Ramjai Mazimdár*, 6 B. L. R. Ap. 67. The confinement of a man on political grounds under a warrant issued under the provisions of Bengal Regulation III of 1818 is not a bar to a prosecution under the regular criminal law for offences charged to have been committed before such confinement (*The Queen* v. *Amír Khan and others*, 9 B. L. R. 36).

Such judgment, order or decree is conclusive proof that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment [order or decree[1]] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment [order or decree[1]] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment [order or decree[1]] declares that it had been or should be his property.

[With reference to this section, the Select Committee on the Bill remarked in their report as follows:—"For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lal* v. *Radhacharan*, 7 W. R. Civ. Rul. 339."[2] The following is the judgment delivered in this case by the very learned Chief Justice, and concurred in by the other Judges of the Full Bench:—

Kanhya Lal and others v. *Radhacharan and others.*

"This suit was brought by Kanhya Lal, as heir of Ramnarain Singh, for a declaration of his right of heirship, and for possession of certain lands with *mesne* profits. The other plaintiffs claimed a portion of the estate by purchase from Kanhya Lal.

The plaintiff alleged that Ramnarain obtained the property from Júmak Lal, his maternal grandfather, by deed of gift; that Ramnarain died without issue, leaving Mussamat Deo Kúnwar his widow; and that upon her death the property *descended to the plaintiff as the nephew and*

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[1] The words in brackets were added by the amending Act, XVIII of 1872.

[2] S. C. 2 Jur. N. S. 229; and 3 R. C. & C. R. Civ. Rul. 240.

heir of Ramnarain, the plaintiff being the son of Ramnarain's natural brother, and grandson of his natural father.

The principal defendant, Radhacharan, denied the plaintiff's right as heir of Ramnarain. He alleged that *Ramnarain was adopted by Júmak Lal; and that on the death of Ramnarain without issue* the right accrued to defendant Radhacharan as an agnate of Júmak Lal, and did not descend to plaintiff as the son of Ramnarain's natural brother.

The other defendants claimed by purchase from Radhacharan.

The plaintiffs denied that Ramnarain was adopted by Júmak Lal. The defendants, in support of their allegation of the adoption, relied upon a decree obtained by defendant Radhacharan in a suit brought by him against Mussamat Deo Kúnwar, the widow of Ramnarain, to set aside certain alienations made by her, and to have his title as reversionary heir established. The suit was defended by Mussamat Deo Kúnwar on the ground that her husband *had not been adopted, and that he took the property by deed of gift from Júmak Lal*, and consequently that Radhacharan was not heir in reversion. The present plaintiff presented a petition in that suit, asserting his right on the same ground as that on which he now sues, but the Court held that no order was requisite on his petition, and *he was not made a party to the suit.* The Court in that case found that Ramnarain was adopted by Júmak Lal, and that the then plaintiff and now defendant, Radhacharan, was the reversionary heir. The judgment was affirmed in appeal in 1853.

It was contended on the part of the defendants in this case that that judgment was a judgment in rem *as to the adoption.* On the trial of the case, the Judge, upon the authority of a case reported in the *Weekly Reporter*, Vol. III, page 14, Civil Rulings, in which Rajkristo was appellant, held that the judgment was a judgment *in rem quoad* the adoption, and that it was final and conclusive against the present plaintiff upon that point. The first Bench, before whom this appeal came, felt themselves bound, in consequence of the decision above-mentioned, to refer to a Full Bench the following question, *viz. whether the judgment was admissible as evidence against the plaintiff; and, if so, whether it was conclusive, or merely* primâ facie *evidence against him?*

The case has been fully argued before us, and we are of opinion that *the judgment was not a judgment* in rem, *and that it was not admissible in evidence against the plaintiff.*

The petition of the plaintiff in the suit brought by Radhacharan having been rejected, the plaintiff was no party to that suit.

The general rule was clearly laid down by Chief Justice DeGrey in the Duchess of Kingston's case. In answer to certain questions put to the Judges by the House of Lords, he said:—'It is certainly

See 2 Smith's Leading Cases, page 424.

true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine' (and he might have added to cross-examine) 'witnesses or to appeal from a judgment which he might think erroneous; and therefore the deposition of witnesses in another case in proof of a fact, the verdict of a jury' (or, in this country, of a Court) 'finding the facts, and the judgment of the Court upon the facts found, *although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers.* There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them. *From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true;* FIRST, that the judgment of a Court of *concurrent* jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive *between the same parties upon the same matter directly in question* in another Court' (or he might have added in another action between the same parties in the same Court); 'SECONDLY, that the judgment of a Court of *exclusive* jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. But *neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*'

The principle that a judgment is not to be used to the prejudice of strangers was adopted from the civil law, of which the following were maxims that "*Res inter alios judicata nullum inter alios prejudicium facit;*"[1] or "*Res inter alios acta alteri nocere non debet.*"[2] The principle was not applicable to judgments in actions *in rem.* The *exceptio* of judgments *in rem* in the civil law was no doubt the foundation of the exception in the English law.

The question as to what is a judgment *in rem* was fully considered by Mr. Holloway in Madras Regular Appeal[3] No. 48 of 1864, 2 Stokes and O'Sullivan's Reports, 176. Although I cannot concur in the whole of Mr. Holloway's reasoning, I consider that the full investigation,

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[1] "A matter adjudicated upon between one set of parties in nowise prejudices another set of parties."

[2] "A matter transacted between one set of persons ought not to injure or affect another person."

[3] *Yara Kalamma* v. *Annakala Naramma.*

which the subject received at his hands in that case, has been of great benefit in removing many erroneous impressions which previously existed. I concur with him entirely in the conclusion at which he arrived, *viz.* that a decision by a competent Court that a Hindú family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or, more correctly speaking, in an action in *personam*, is not a judgment *in rem*, or binding upon strangers, or in other words upon persons who were neither parties to the suit nor privies. I would go further, and say that a decree in such a case is not and ought not to be admissible at all as evidence against strangers.[1]

I do not think that Mr. Smith's definition of a judgment *in rem* is accurate. But Mr. Holloway has not, I think, attached sufficient importance to the words used by Mr. Smith—'which very declaration operates upon the *status* of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be.' This would not be the effect of a finding upon a question of *status* in a suit *in personam*, though it might have been so under the civil law in a suit *in rem*, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the *status*.

I do not agree with Mr. Holloway in his remark at p. 281 of his judgment—'that the effect of a decree of every competent Court is to render the person or thing that which it declares him, or it, to be.' A decree, according to the nature of it, may prevent particular persons or the subjects of a particular Government, or it may be the whole world, from averring to the contrary. According to the civil law a suit, in which a claim of ownership was made against all other persons, was an action *in rem*, and the judgment pronounced in such action was a judgment *in rem*, and binding upon all persons whom the Court was competent to bind; but if the claim was against a particular person or persons, it was an action *in personam* and the decree was a decree *in personam* and binding only upon the particular person or persons against whom the claim was preferred, or persons who were privies to them.

This will be made more clear by referring to the note of Mr. Sandars upon section 1, Book 4, Tit. 6, of the Institutes of Justinian, a section which is quoted by Mr. Justice Holloway in his judgment above referred to. He says:—'*The first and most important division of actions is that into actions* in rem *and actions* in personam: *by the first of which we assert a right over a thing against all the world: by*

[1] But see now section 13, *ante*, pp. 93–96; and sections 42 and 43, *post*.

the second we assert a right against a particular person (see Introduction, section 61), and accordingly, speaking technically, an action was called *real*, when the formula in which it was conceived embodied a claim to a thing without saying from whom it was claimed; and *personal*, when the formula stated upon whom a claim was made. If Titius said that a piece of land belonged to him, there was no necessity that the name of the wrongful occupier should appear in the formula, at any rate not in the *intentio*,[1] the part of the formula always considered characteristic of the *actio*. *Si paret Titii esse rem*—this was all; the question to be decided was—does the thing belong to Titius? It was only as a consequence of Titius's proprietorship being established that the wrongful occupier, whose name might appear in the *condemnatio*, was condemned to lose the possession. But, in an action arising on a contract, the name of a person was necessarily introduced into the *intentio*. *Titius* could not merely say that a thing was owed to him, he must add that it was owed by a particular person. There are, indeed, some cases, as for instance a deposit, in which the action may be equally well-shaped with or without the insertion of the name of a particular person. There may either be a real action in which the plaintiff claims the thing, or a personal one, in which he says that the depositary ought to give it him. Whenever the action is made to rest on an obligation, it is personal; when on a right of proprietorship, it is real.'

The case is made still more clear in para. 61 of the Introduction. There Mr. Sandars says:—'His special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim sanctioned by law is urged directly; the owner, as he is said to be, of the thing publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing confers. Sometimes the claim is more indirect; the claimant insists that there are one or more particular individual or individuals, who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a

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1 "The formula usually consisted of three distinct parts called *demonstratio*, *intentio*, and *condemnatio*.

The *demonstratio* stated shortly what had given rise to the litigation.

The *intentio* set forth the plaintiff's claim, and the question which the *judex* was called upon to decide.

The *condemnatio* gave the Judge power to condemn or acquit the defendant, according to the result of his examination of the affair."—*Lord Mackenzie's Studies in Roman Law*, p. 303.

claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal, expressed by writers of the middle ages on the analogy of terms found in the writings of the Roman jurists, by the phrase *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of the right, as well as a thing as its object—a right which gives its possessor a power to oblige another person to give or procure, or do or not do, something. It is true that in a real right the notion of persons is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done.'

Besides actions *in rem* which related to property, there were certain actions called *actiones prejudiciales*. Of these it is said in the Institutes, Book 4, Tit. 6, s. 13, that they seem to be actions *in rem*, such as 'those by which it is inquired whether a man was born free or had been made free; whether he was a slave, or whether he was the offspring of his reputed father.' These actions no doubt were the origin of the rule laid down as to judgments on actions, in which questions relating to *status* were determined.

Mr. Sandars, in his note to that section, says:—'The object of a *prejudicialis actio* was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings.[1] Such actions differ from actions *in rem*, because in an *actio prejudicialis* no one is condemned, only the fact is ascertained, but they are said in the text to resemble actions *in rem*, because they were not brought on any obligation, and because in the *intentio*, which indeed composed the whole formula in this case, no mention was made of any particular person. Questions of *status*, such as those of paternity, filiation, and the like,

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[1] The *actio* is the legal remedy by which a private person, called the *actor* or plaintiff, enforces a private lawful claim . . . . According to their object actions are divisible into—1. Those instituted for the purpose of obtaining a judgment against the defendant who is called *reus*. 2. Those which proceed for the preliminary recognition of a certain relation (*actiones prejudiciales, &c.*) *Modern Roman Law*, by Tomkins and Jencken, p. 85.

were most commonly the subject of *actiones prejudiciales*, but were by no means the only ones. We hear of others.'

In Austin on Jurisprudence, Vol. III, page 165, it is said:—'In case a child is detained from his father, the latter can recover him from the stranger by a proceeding in a Court of Justice, which, let it be named as it may, is substantially an action *in rem*. In case a slave be detained from his master's service, the master can recover him in *specie* from the stranger who wrongfully detains him.' It is a mistake, I think, to call such actions actions *in rem*, they are strictly actions *in personam*. An action by a person alleged to be a slave, claiming to have it declared as against all men that he was a freeman, was an *actio prejudicialis* in which the judgment would have contained a declaration upon the *status*.

Great misunderstanding and error have been caused, as is shown by Mr. Holloway, from the use of the words '*status*,' and "judgments *in rem*" in some of our English text-books without any precise definition, and indeed in some cases without any accurate conception of their meaning. For instance, I have seen it stated that 'judgments declaring personal *status* or condition, as judgments of adultery, are conclusive upon all the world.' What a judgment of adultery is, or how adultery can be said to declare a personal *status* or condition, it is difficult to conceive. Possibly it means a judgment of divorce on account of adultery; but, if so, it is not a judgment *in rem*, or conclusive upon all the world of the fact of adultery.

It is unnecessary to consider more minutely the civil law upon the subject of judgments *in rem* or of *actiones prejudiciales*. It is sufficient to say that they were not actions *in personam*, and that the claims in them were advanced generally against every one, and not against particular individuals.

From what has been said, it will be readily seen that there are no suits in this country, with the exception of those in the High Court in the exercise of Admiralty and Vice-Admiralty jurisdiction, which answer to the actions *in rem* of the civil law,[1] and none corresponding with the *actiones prejudiciales*. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is, therefore, unnecessary to refer to them. We have not as yet any suits here for divorce *a vinculo matrimonii*, so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits.[2]

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[1] The Privy Council appeared inclined to approve this view in *Jagendro Deb Rai Kut* v. *Fanendro Deb Rai Kut*; see remarks, 14 Moo. In. Ap. 374.

[2] This judgment was pronounced in 1867, i. e. two years before the passing of "The Indian Divorce Act," IV of 1869.

Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce or sets aside a marriage between Muhammadans or Hindús, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit, as Mr. Holloway appears to think, for if they had notice they could not intervene or interfere in the suit; but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons; a valid marriage causes the relationship of husband and wife not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Muhammadan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.

The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced (see cases referred to in Smith's Leading Cases, Vol. II, page 439[1]), and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive nor even primâ facie *evidence against strangers that the cause, for which the decree was pronounced, existed.* For instance, if a divorce between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *primâ facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So if a marriage between Muhammadans were set aside upon the ground of consanguinity or affinity—as, for instance, in the case of a Muhammadan, that the marriage was with the sister of another wife then living—the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.

It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question,

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[1] See section 43, *post*.

and the Indian Succession Act, No. X of 1865, section 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conclusive.

It is quite clear that there are no judgments *in rem* in the Mufassil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers, either as conclusive or even as *primâ facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment, or by the finding, upon any issue raised in the suit whether relating to *status*, property, or any other matter.[1]

If a judgment in a suit between A and B that certain property, for which the suit was brought, belonged to A, as the adopted son of C, were a judgment *in rem*, and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused. For instance, suppose that a Hindú, one of four brothers, should be entitled to a separate estate consisting of a large zemindarí, yielding an annual profit of two lacs of rupees, and also of a small piece of land in a distant zemindarí, and that, upon his death without issue and without leaving a widow, the surviving brothers, as his heirs, should enter into possession, and sell the small piece of land, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in the Munsif's Court to recover the land so sold upon the ground that, he being the heir by adoption, the brother of the deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant without any collusion in establishing the alleged adoption might succeed and recover the land. Moreover, the purchaser might not have the means to enable him to appeal. Now, if this judgment were a judgment *in rem*, and conclusive against the brothers as to the *status* created by the alleged adoption in a suit brought against them for the zemindarí, they would have no means of defending their possession, however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption. Assume that the purchaser in the Munsif's Court was perfectly honest and *bonâ fide*, and that the Munsif's Court was one of competent jurisdiction, having regard to the situation and value of the property, and hold that the decree was a judgment *in rem*, and there would be no means of getting rid of the decree of the Munsif's Court, and thus the decree of the Munsif in a suit for land within his competency would finally and conclusively determine the title to the zemindarí against persons who might never have heard of the suit in the Munsif's

[1] But see now section 13, *ante*, pp. 93—96; and sections 42 and 43, *post*.

Court whilst it was going on. There is no ground upon which it could be held that the decree in such a case would be admissible merely as *primâ facie* evidence. It must either be conclusive as a judgment *in rem*, or fall within the general rule, and not be admissible at all upon the question of adoption. If it could be admitted as even *primâ facie* evidence, it might work the greatest injustice by throwing the burden on the defendants, and compelling them to prove a negative, *viz.* that the claimant had not been adopted; and this, probably, after many years from the time at which the adoption is alleged to have been made. The fact is, that the Munsif in such a case would be competent to try the rights of the parties to the lands claimed, and *incidentally to determine the question of adoption.* But he would have no power to entertain a suit merely for the purpose of determining a question of *status*.

We have no hesitation in answering both the questions in the negative, and in stating that the judgment of the 26th September, 1853, was not admissible either as *primâ facie* or conclusive evidence against the plaintiff upon the question of adoption.

This decision is quite in accordance with the decision of the Privy Council in the Rajah of Shivagunga's case, reported in 9 Moo. Ind. Ap., page 539. In that case, their Lordships remarked that 'a judgment is not a judgment *in rem*, because in a suit by A for 'the recovery of an estate from B, it has determined an issue raised 'concerning the *status* of a particular person or family. It is clear that 'this particular judgment was nothing but a judgment *inter partes*.'

In the case No. 299 of 1864, in consequence of which this case was referred to the Full Bench, the Judges, referring to the Shivagunga case, say:—'In 'Goodeve on Evidence,' pp. 288, 290, adoption like marriage and bastardy is expressly mentioned as one of the cases in which a judgment would be final and conclusive. The reasoning of their Lordships of the Privy Council in the case (the Shivagunga case) reported at pages 36 and 37 of the *W. R.* for April, 1865, No. 12, seems to point to the same conclusion.' So far from this being the case, the decision of the Privy Council appears to us to be in direct opposition to the rule laid down by Mr. Goodeve."

In *Jagendro Deb Rai Kut* v. *Fanendro Deb Rai Kut* (14 Moo. Ind. App. 367; S. C. 11 B. L. R. 244) the facts were as follow:—The Rajah of Jalpaigori died, leaving several wives and concubines, amongst whom were A, B, and C. He left a minor son by A, named R; and a son by B, named M: and a posthumous son, F, was born of C. A succeeded in getting the name of her son R registered in the Collectorate as proprietor of the estate. M then applied to the Civil Court and obtained an order in his favour under Act XIX of 1841, under

which he obtained possession of the Raj and the property thereto belonging. On this, A instituted a regular suit to establish the right of her son R to the whole of the property, movable and immovable, alleging that R was the legitimate son of the deceased Rajah and a preferable heir to M, who was the son of a slave girl. This suit was finally decided by the Sadr Diwáni Adálat in favour of M, who in consequence held the Raj till his death, and was then succeeded by his eldest son, who, dying without a son, was in 1865 succeeded by his brother X. In 1866 a suit was instituted against X on behalf of F, who was then a minor, in which the succession was claimed for him as the legitimate son by a married wife of the first class, and therefore a preferable heir to M, who, it was again alleged, was the son of a slave girl. To this suit the decree of the Sadr Diwáni Adálat in the former suit was pleaded as conclusive evidence of M's right to succeed. The District Judge held that this decree had the force of a judgment *in rem* and was conclusive against the whole world as to M being the rightful heir. The High Court reversed this decision, and the Privy Council upheld the judgment of the High Court. Their Lordships, having observed that it appeared to them extremely doubtful whether there exists in India (exclusive of the particular jurisdictions exercised by the High Courts in matters of Probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving what can be called technically a judgment *in rem*, said:—"In the present case the plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit as to the illegitimacy of M; but he also raises the question of a priority of right by reason of the superior nature of the marriage between the *rajah* and his mother. The issues in the two suits, therefore, are not precisely the same. But, if they had been precisely the same, their Lordships would still have been of opinion that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any way be likened to those which sometimes occur in India, wherein, the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit as the first suit were brought here and tried according to the law of this country, there could not be a pretence for saying that the judgment in it was anything like a judgment *in rem*, or that it could bind any but the parties to the suit. It would have been a mere suit for posses-

sion, by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party. It therefore seems to their Lordships unnecessary to consider whether any ordinary *Zillah* Court in India could in any case pass a decision which would have the effect contended for at the bar in this case, *viz.* that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be applied to it."

The term "judgment *in rem*" is not, it may be observed, used in the Indian Evidence Act, though section 41 of the Act incorporates the law on the subject of judgments *in rem*, as explained in the above decision of the Calcutta High Court. It may not, however, be out of place to give some account of the origin and meaning of a term, as to which some confusion of idea has occasionally existed. I venture to think that an accurate conception of what the term itself implies, and of how it came to imply this, will conduce to a clear understanding of the law, and to its correct application.

Meaning of the term '*in rem.*'

In all the instances in which the phrase '*in rem*' occurs, the subject to which it is applied is a something which avails generally, *quod generatim in causam aliquam valet.* "How the phrase '*in rem*' came to acquire this meaning," says Mr. Austin, "it is not very easy to perceive. It is one of the elliptical expressions with which language abounds, and which too frequently obscure the simplest and easiest notions. In this instance it might be possible to restore the links which are dropped, to connect '*res*' (as signifying a thing) with '*in rem*' (as signifying *generality*); but I have neither space nor time for merely etymological researches. To mark the important purpose to which the phrase may be turned, is matter of more moment. Although it is applied by the Roman lawyers to a considerable number of cases, they always apply it partially. They nowhere use it for the purpose of signifying briefly and unambiguously 'rights of *every* description which avail against persons *generally*.' The large generic expression '*jus in rem*' is not to be found in their writings. This expression was devised by the Glossators, or by the Commentators who succeeded them. Seeing that the phrase '*in rem*' always imported *generality*, and feeling the need of a term for '*rights* which avail generally,' they applied the former to the purpose of marking the latter and talked of '*jura in rem.*' . . . . . Now, the expression '*jus in rem*,' in this its analogical meaning, perfectly supplies the *desideratum* which is stated above. For as '*in rem*' denotes

generality, '*jus in rem*' should signify *rights* availing against persons *generally*. Therefore it should signify *all* rights belonging to that *genus*, let their specific differences be what they may."[1]—The phrase '*in rem*' in the expression '*jus in rem*' does not therefore mean 'over or against a thing,' nor has it any reference to *things* as the subject of rights; but it means 'generally.' To use Mr. Austin's language, 'the phrase *in rem*' denotes the *compass*, and not the *subject*, of the right. It denotes that the right in question avails *against the world at large*. Comparing the phrase '*jus in rem*' with the other phrase '*jus in personam*,' Mr. Austin remarks:—"'*jus in personam*' (*certam sive determinatam*) is expressive and free from ambiguity. Cut down to '*jus in personam*' it is also sufficiently concise. *Jus in rem*, standing by itself, is ambiguous and obscure; but, when it is *contradistinguished* from *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed."[2]

Jus in personam, therefore, means a right which avails *exclusively* against a *determinate* person or against *determinate* persons. *Jus in rem* means a right which avails *against the world at large*.[3] Mr. Austin gives the following example:—A contracts to deliver a certain movable to B. If A neglect or refuse to deliver, B can sue him to compel delivery or for damages for non-delivery. B has, in fact, a *jus in personam*, or right against a determinate person, A; but has no right against strangers to the contract between him and A. If, however, A deliver the movable to B, in consequence of the delivery by A and the concurring apprehension by B, the thing becomes the property of B, who acquires a *jus in rem*, a right *over* the thing, or a right *in* the thing as against all mankind.

Mr. Austin then points out very clearly that *jura in rem* are of three kinds:

Jura or Rights *in rem*.

I.—Rights *in rem*, which are rights over *things*;

II.—Rights *in rem*, which are rights over *persons*;

III.—Rights *in rem*, which have *no determinate subjects* (persons or things).

Of the *first* class, the *movable* already referred to is a sufficient *illustration*. After delivery, it becomes the property of B as against all the world. B acquires therein a *jus in rem*.

Treating of the *second* class, Mr. Austin points out that a person who is the *subject* of a *jus in rem* is placed in a position *like* the position

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[1] *Austin's Lectures on Jurisprudence*, pp. 991 and 992, edition of 1869, by Robert Campbell—London: John Murray.

[2] *Id.*, p. 990.

[3] *Id.*, pp. 380, 814.

of a *thing* which is the subject of a similar right, and may be styled by analogy *a thing*.[1] He gives as examples of this class the right of the father to the custody and education of the child, and that of the guardian to the custody and education of his ward, and the correlating conditions of husband and wife. "But considered from another aspect," he observes, "these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons *generally* or against the world at large, and the duties to which they correspond are invariably *negative*. As against other persons generally, they are not so much rights to the custody and education of the child, &c. as rights to the *exercise* of such rights *without molestation by strangers*. As against strangers, their substance consists of duties incumbent upon strangers, to forbear or abstain from acts inconsistent with their scope or purpose."

Passing to the *third* class, Mr. Austin gives the following examples: A man's right or interest in his *good name*, which right avails against persons, as considered generally and indeterminately; a monopoly or the right of selling exclusively commodities of a given class, all persons *other* than the party in whom the right resides being bound to forbear from selling commodities of this particular class; franchises; and, lastly, a right in a *status* or condition (considered as an aggregate of rights and capacities). "To determine precisely what a *status* is, is, in my opinion," says Mr. Austin, "the most difficult problem in the whole science of jurisprudence." Elsewhere he lays down the following propositions as to what constitutes a *status*:—

Status.

1*st*.—The notion is not capable of being fixed with perfect exactness. There are sets of rights and duties, capacities and incapacities, which one person might deem to constitute *status*, while another might refer them to the law of *Things*.

2*nd*.—The distinction between the rights and duties, capacities and incapacities constituting a *status*, and any other rights, duties, capacities and incapacities, is not susceptible of any strict definition.

3*rd*.—There is no generic character common to them all, but they bear the following marks—(*a*) They reside in an individual as belonging to a class; (*b*) the rights and duties, capacities and incapacities constituting a *status*, commonly impart to the party invested with them a conspicuous character, and have an extensive influence over his social relations, though this is not a certain mark of *status*; (*c*) they regard specially the class of persons by whom the *status* is borne; (*d*) this last

[1] *Austin's Lectures on Jurisprudence*, edition of 1869, pp. 396—397.

circumstance constitutes the *rationale* of the distinction between the law of *Things* and the law of *Persons*.

The following remarks of Mr. Austin are also important:—"The reason why *status* or *condition* makes so little figure in the English law as compared with the Roman, though the idea must of course exist in all systems of law, seems to be this, that the right in a *status* may by the Roman law be asserted directly and explicity by an action expressly for its recovery, while in English law no such action can be brought, and the right to a *status*, though of course it often becomes the subject of a judicial decision, almost always comes in as an episode incidental to an action of which the direct purpose is something else. Thus a question of legitimacy, which is precisely a question of status, is usually brought in and decided upon incidentally in an action of ejectment. . . . . . The only case in which a question of *status* is decided directly in English law is when a jury is summoned to try that precise question as an *issue* incidental to a suit in another Court."[1] The term "legal character," used in the Indian Evidence Act, is, as near as may be, the English equivalent for status.[2]

So far of *jura in rem;* but what of *judgments in rem?* Is every judgment, which creates a *jus in rem*, a *judgment in rem?* I venture to think not; at least, if by *jus in rem* is meant all that class of rights which the Glossators or Commentators designed to express by this phrase as opposed to those rights which they distinguished by the other phrase, *jus in personam*. Suppose, for instance, a successful action for the *movable* which Mr. Austin gives as an example in speaking of the *first* class above-mentioned of rights *in rem* over things. B, having obtained the movable by the action of a Court of Justice, would acquire in it a *jus in rem* none the less than if A had delivered it voluntarily; but such a judgment would not be a *judgment in rem*. It is, therefore, possible for a judgment to create a *jus in rem* over a thing without being a judgment *in rem*. With regard to *jura in rem*, which are rights over persons (the *second* class), Mr. Austin observes that all, or nearly all, of them are matter for the law of persons and the law of *status*. As to the *third* class, in so far as they are concerned with *status*, I have already given Mr. Austin's remarks. The more these remarks and Mr. Austin's whole dealing with the subject are examined, the more clear it will be that every judgment which creates a *jus in rem* is not a *judgment in rem*. It is true that every *judgment in rem* creates a *jus in rem*, but the converse of this proposition is not true. In fact,

Judgments *in rem* and *jura in rem*.

[1] *Austin's Lectures on Jurisprudence*, edition of 1869, pp. 401—402.

[2] See also as to *status*, Westlake's Private International Law, pp. 378—389.

I venture to think that there is no more exact connection between the term *jus in rem* (which was a phrase invented by the later civilians on the analogy of a term which was used, as Mr. Austin says, by the Roman lawyers in a very much more partial sense) and the term *judgment in rem* (which was a phrase invented by lawyers of a later age), than there was between the *jus in rem* of the civilians and the term from which it was borrowed, and which was used by the Roman lawyers. I take the truth to be this: According to the Roman system there were certain forms of proceeding by which claims could be advanced against all men. These were called *actiones in rem* (see Sandars' note on section 1, Book 4, Title 6 of the Institutes of Justinian), or *real actions*. "A real action," says Lord Mackenzie (Studies in Roman Law, p. 307), "is that which arises from a right in the thing itself—*in re*, either as proprietor, &c." *i. e.* a right as against every one else. "A personal action is founded on an obligation undertaken by another." Mr. Sandars and Lord Mackenzie think that *in rem* in the phrase *jus in rem*, invented by the civilians, corresponds to *in re* in the phrase *jus in re* used by the classical jurists, but I apprehend that this is not so. *Jus in re* meant *jus in aliená re*. A servitude over another man's land, for example, was a *jus in re*. The term "*in rem*" is found in Justinian and elsewhere; but in connection with "*actio*," not with "*jus*." It was called an *actio in rem* (see Justinian's Institutes, Book 4, Title 6, section 1), in opposition to an *actio in personam*, because the former action went upon the right to or over the thing, the latter went upon the right against or over the individual. The effect of the latter action was to conclude the individual only, the effect of the action *in rem* was to conclude the whole community. This effect was an accident arising from the particular system, but those who have studied the curious history of words and their meanings will understand how natural it was that the words "*in rem*" should remain to express the effect of this action long after Roman forms of procedure had passed away. It was most natural that the civilians of the twelfth or thirteenth century, when making their division of rights which avail against the world, and rights which avail against individuals only, should select the words "*in rem*", to express the former, or should be led to use them in the very meaning which they had then come to have. "*In rem*" had come to mean "generally," and to be applied to that which avails against all mankind; and out of it and "*jus*" was compounded a term which meant "a right good against the whole world." When lawyers of a later age wanted to express that a judgment availed against the whole world, they took the same term and compounded it with "judgment." It may be interesting to note the three stages:

1*st.*—*Actio in rem* created what was in fact a right good against all mankind. 2*nd.*—The civilians applied the term *jus in rem* as a class-term to all such rights; but it is clear that all such rights were not the creation of the Roman *actio in rem*, i. e. that there were *jura in rem* other than those which were created by *actiones in rem*. 3*rd.*—Later lawyers coined the term *judgment in rem* to express a judgment which has the same essential difference from other judgments, *viz.* being good against all mankind, as a *jus in rem* has from other *jura;* but it does not follow as a necessary consequence from this that all judgments which create *jura in rem* are "*judgments in rem.*"

Mr. Austin points out that "*in rem*" denotes the *compass*, not the *subject*, of the right. So "*in rem*" denotes the *compass*, not the *subject*, of the judgment. "*Judgment in rem*" is a name given to a particular *kind* of judgment. What kind, the words "*in rem*" do not indicate, save by their history as I have attempted to give it. The effect of such a judgment is not to be explained by the nature of the procedure necessary to obtain it. Sir Barnes Peacock has very clearly shown that it is an error to explain it on the principle that every one is presumed to have had notice of the suit, for, even if they had notice, they could not intervene or interfere.

I think the result then is, that the only definition of "*judgment in rem*" which can properly be given is, that it is a "judgment which binds all men, and not only the parties to the suit in which it was passed and their privies;" and that it belongs to positive law to say what judgments are to be judgments *in rem*, whether for reasons of international comity or of domestic expediency. As the above section of the Indian Evidence Act stands, a judgment, in order to have this effect, must have been pronounced by a *competent* Court in the exercise of Probate, Matrimonial, Admiralty, or Insolvency jurisdiction.

Probate.

Civil Courts in India, other than the High Courts, have *probate* jurisdiction under the provisions of the Indian Succession Act, X of 1865 (see Part XXXI, section 235, and following sections. As to Hindús, &c. see Act XXI of 1870). A grant of *probate* or of *administration* actually invests the executor or administrator with the character which it declares to belong to him, and is conclusive against all the world. It may, indeed, be shown that the grant was revoked, for that is the further act of the same Court; or that it was forged, for that shows it not to be the act of the Court at all; or that it was granted by a Court having no jurisdiction,[1] for then it is a nonentity. But it cannot be shown that the testator was mad or that the *will* was forged, for those facts might have

[1] See section 44, *post.*

been alleged in the Court, which had jurisdiction to grant probate or administration, in opposition to such grant.[1]

Matrimonial Jurisdiction.

Civil Courts in India, other than the High Courts, have Matrimonial jurisdiction under the following Acts now in force, *viz.*—IV of 1869, "The Indian Divorce Act," relating to the divorce of persons professing the Christian Religion;—XV of 1865, relating to divorce among Parsís;—XXI of 1866, "The Native Converts' Marriage Dissolution Act;"—XV of 1872, "The Indian Christian Marriage Act;"—XV of 1865, relating to marriage amongst Parsís;—and III of 1872, relating to marriage between persons not professing the Christian, Jewish, Hindú, Muhammadan, Parsí, Budhist, Síkh, or Jaina religion.[2]

Admiralty Jurisdiction.

As to the Admiralty jurisdiction of the High Courts, see section 32 of the Letters Patent of 1865 for the Calcutta High Court, and the corresponding sections of the other Letters Patent for the other High Courts. As to the Admiralty jurisdiction of the Mufassil Courts, see 12 and 13 Vict. Cap. 96; and 23 and 24 Vict. Cap. 88. It is with reference to vessels condemned as *prizes* more especially that questions concerned with Admiralty jurisdiction arise, such a sentence of condemnation by a competent Court being usually conclusive upon all the world.

Insolvency Jurisdiction.

For the law regulating the Insolvency jurisdiction of the High Courts, see the 11 and 12 Vict. Cap. 21; and for the Calcutta High Court, section 18 of the Letters Patent of 1865; and for the other High Courts, the corresponding sections of their respective Letters Patent. Such Insolvency jurisdiction, as can be exercised by the Mufassil Courts, is regulated by Chapter XX of the Code of Civil Procedure, Act X of 1877.[3]

The section does not expressly mention Courts-Martial; but it will be remembered that they are included in the operation of the Act

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[1] See 2 Smith's Leading Cases, p. 804. As to the Probate Jurisdiction of Foreign Courts, see Westlake's Private International Law, pp. 278—310; and Story on the Conflict of Laws, §§ 507-529*m*.

[2] With reference to the judgments and orders of Foreign Courts in matrimonial causes, see Westlake's Private International Law, pp. 315—360; and Story on the Conflict of Laws, §§ 200-230*d*.

[3] As to the effect of Foreign Judgments in Bankruptcy and Insolvency, see Westlake's Private International Law, pp. 262—278; and Story on the Conflict of Laws, §§ 403-423*b*.

(section 1 *ante*).[1] It may be observed that a judgment *in rem* will, under the above section of the Indian Evidence Act, be conclusive in a criminal equally as in a civil proceeding—a proposition as to which there is some doubt in English law; see 2 Smith's Leading Cases, 804—805; and Taylor on Evidence §§ 1493—1494.]

Judgment, order or decree between third parties when irrelevant and when not.

42. Judgments, orders or decrees other than those mentioned in section forty-one, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

[See *ante*, pp. 93, 162, and 174. As to "conclusive proof," see *ante*, p. 82.]

What judgments, &c. not relevant.

43. Judgments, orders or decrees, other than those mentioned in sections forty, forty-one, and forty-two, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.[2]

Illustrations.

(*a*.) A and B separately sue C for a libel which reflects

[1] As to Courts-Martial, see 2 Smith's Leading Cases, 810, and cases ther quoted.

[2] See remarks at page 95, *ante*.

upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(*b.*) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was B's wife.

The judgment against B is irrelevant as against C.

(*c.*) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(*d.*) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

[In order to prove *the existence of a judgment, its date or its legal consequences*, the production of the record or of a certified copy (see section 76, *post*) is conclusive evidence against all the world. Thus, though a judgment against A will not be evidence against B, except in those cases which have been already provided for by the Evidence Act, yet, where A sues B for negligence as his agent, he may, in order to prove the *consequences* of the negligence to himself, produce the record of a judgment obtained against him by a third party in an action brought to recover damages for the effect of such negligence. Such judgment is evidence as to the quantum of damages, though not as to the fact of the injury.[1] Again, if a person charged with an offence under the Indian Penal Code were acquitted, the record would be conclusive evidence to establish the *fact of acquittal* in a civil suit by him against the prosecutor to recover damages for a malicious prosecution; but it would be no evidence that the defendant in the civil suit was the prosecutor in the criminal case; or of malice; or of want of probable

[1] See 2 Smith's Leading Cases, 7th ed. 785, and cases there cited.

cause; and the defendant notwithstanding such acquittal would be entitled to prove the plaintiff's guilt.[1] So a judgment recovered against a surety will be evidence for him, to prove the *amount* which he has been compelled to pay for the principal debtor, but it will be no evidence of his having been legally liable to pay that amount through the principal's default. If one of two or more persons, who have jointly borrowed money and have executed a joint bond, be sued for and have to pay the whole debt, the judgment will be evidence of the amount which he had to pay, if he afterwards sue his co-obligors for contribution, but it will be no evidence of the genuineness of the bond, of the joint liability, or of the shares in which the co-obligors are respectively liable. A, B, and C were joint owners of certain land. During the minority of C, A and B gave a *maurasi* lease to X. C, on attaining his majority, sued A, B, and X successfully to have this lease set aside. Upon this, X sued A and B to recover the one-third portion of the purchase-money which represented C's share, alleging fraud on their part. It was held that the judgment in the previous case was not evidence of the fraud so alleged (*Dúrga Charan Bhattacharjya and others* v. *Shusi Bhúsan Mittra and another*, 5 W. R. S. C. C. Ref. 23). Upon a trial for intentionally giving false evidence in a stage of a judicial proceeding (section 193 of the Indian Penal Code), the record will be evidence that there was a judicial proceeding and of the stage in which the evidence charged as false was given. In a trial for intentionally or negligently suffering to escape a person *convicted* of an offence (sections 222-223 of the Penal Code), the record will be evidence of the conviction. In an action to recover lands, a decree in a suit between the defendant's father and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate *as his own property*, was held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining *in what character* the father, through whom the defendant claimed, had afterwards taken actual possession of the estate.[2] The principle upon which judgments *inter alios* are thus admitted is explained by English text-writers to be this, that the *record is matter of inducement* or merely introductory to other evidence.

Judgment in Criminal case not evidence in Civil case, or *vice versâ*.

It is a general rule, which has been acknowledged and followed in India as well as in England, that a judgment in a criminal case (unless, indeed, admissible as evidence in the nature of reputation) cannot be received in a civil action to establish the truth of the

[1] Taylor on Evidence, § 1480, and cases there cited.

[2] *Davies* v. *Lowndes*, 6 Manning and Granger's Rep. 471, 520.

facts upon which it was rendered, and that a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution (Tay. § 1505, and cases there recited: *Nityanand Surma and others* v. *Kashinath Neiyalankar*, 5 W. R. Civ. Rul. 26: *Bissonath Neogi* v. *Hara Gobind Neogi and others*, 5 W. R. Civ. Rul. 27: *Keramatula Chaudhri* v. *Golam Hosen*, 9 W. R. Civ. Rul. 77: *Ali Baksh Doctor and another* v. *Sheikh Samirudin*, 4 B. L. R. Civ. Rul. 31). A plea of *guilty* may, however, be evidence of an admission (*Shambhú Chandra Chaudhri* v. *Madhú Keibart and others*, 10 W. R. Civ. Rul. 56).

In suits brought to set aside alienations made by Hindú widows and other persons, who have not an absolute and complete interest in the property alienated, the question is often raised, whether or not the alienation was made for *necessary* purposes. In order to prove such necessity, decrees are frequently produced without evidence being given of the circumstances under which the debts were contracted, for the recovery of which these decrees were obtained. Upon the principle above stated, it might appear that such decrees, though good evidence of the *amount* paid, are not evidence, at least on behalf of the alienors, of the facts constituting the *necessity*. In the case of *Babú Kanta Lal and others* v. *Muddun Mohan Thakur* (5 R. C. & C. R. 266; S. C. 9 W. R. 469), A and B, members of a Hindú family subject to the Mithila law, had contracted debts. One of the creditors sued A and B and obtained a decree for the money due to him. In execution of this decree a portion of the ancestral estate was sold and purchased by M. Several years after, the sons of A and B, making their fathers (who were still alive) parties to the action, sued to recover the property thus alienated, on the ground that the debts had been contracted for immoral and not for necessary purposes. M contended that the existence of the decree, in execution of which the property was sold, was, as far as he was concerned, sufficient evidence of necessity, and that he could not be required to go behind the decree, and the facts apparent on the face of the litigation, and to point out the exact mode in which the sums borrowed by their fathers were spent. The Calcutta High Court were of opinion that the decree was not sufficient, and that further evidence of necessity must be given. In the absence of such evidence, a decree was given against M, who thereupon preferred an appeal to the Privy Council. The decision of the High Court was reversed, their Lordships observing:—"A purchaser, under an execution, is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of

the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant" (14 B. L. B. 199; S. C. L. R. 1 I. A. 334; S. C. 22 W. R. 59). The principle here laid down was applied to a similar state of facts in the case of *Budrí Lal* v. *Kantí Lal, &c.* (23 W. R. 260), where the family were alleged to be governed by the Mitakshara law. In *Syud Lútf Hosen, &c.* v. *Darsan Lal, &c.* (23 W. R. 424), a Hindú widow, acting as guardian of her two minor sons, had borrowed one thousand rupees ostensibly for their benefit, for their marriage expenses. Two years after, the lender of this money obtained a decree against the minors in an undefended suit for the money so lent; and having taken out execution, attached and was about to sell the minors' eight-anna share in the ancestral property. The mother, in order to save this property, sold by private contract a moiety of this eight-anna share for Rs. 2,500, and with a portion of this sum satisfied the decree. One of the minors, on coming of age, brought a suit to recover his half of the moiety so sold, alleging that there was no necessity which would have justified the sale. The decision of the Privy Council, which, it was observed, was a decision on the Mithila law, was held to have no bearing on the case; and the High Court considered it obligatory on the purchaser to prove that, when the original loan was taken by the widow, it was a loan taken for the benefit of the infants The case was remanded for the Judge of the lower Appellate Court to try whether the purchaser, upon whom the onus lay, had proved that the decree, under which the execution was taken out, was such a decree as would bind the minor's interests.]

Fraud, collusion, and incompetency of Court may be proved.

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section forty, forty-one, or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

[A judgment delivered by a Court not competent to deliver it, *e. g.* by a Court which had no jurisdiction over the parties or the subject-matter of the suit, is a mere nullity.[1] On the subject of "*jurisdiction*," see *ante*, note to Section 40.

Judgments obtained by Fraud.

With respect to *fraud* or *collusion*, Lord Chief Justice DeGrey said in the Duchess of Kingston's case :—"Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice." Lord Coke says, "it avoids all judicial acts, ecclesiastical or temporal." In *Philipson* v. *The Earl of Egremont*, the Court of Queen's Bench observed that fraud no doubt vitiated everything: and the Court, upon being satisfied of such fraud, has a power to vacate and should vacate its own judgment.[2] "There is," said Pollock, C.B. "no more stringent maxim than that *no man shall be permitted to aver against a record;* but where fraud can be shown, this maxim does not apply.[3] In the case of the *Earl of Bandon* v. *Becher*,[4] the House of Lords observed that the validity of a decree of a Court of competent jurisdiction upon parties legally before it may be questioned on the ground that it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit, or, if pronounced in a real and substantial suit, *between parties, who were really not in contest with each other*." In applying the rule, it makes no difference whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest Court of Judicature in the land; but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[5]

What is Fraud.

The Indian Evidence Act contains no definition of the terms "fraud" and "collusion." Writers on Equity distinguish two kinds of fraud, *viz.* Actual or Positive Fraud and Constructive Fraud. The former is applied to those cases in which there is an *intention* to commit a cheat or deceit upon another person to his injury. "By *constructive* frauds are meant,"

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[1] For instances of the application of this principle see the following cases:—*Kalka Parsad* v. *Kanhaya Singh*, 7 N.W.P. Rep. 99: *Sukram Misser* v. *Crowdy*, 19 W. R. 284; *Ganesh Tatro* v. *Ram Nidhi Kundú*, 2 W. R. 361.

[2] 6 Adolphus and Ellis' Queen's Bench Rep. 587, 605.

[3] *Rogers* v. *Hadley*, 2 Hurlstone and Coltman's Rep. 247.

[4] 3 Clark and Finnelly's Rep. 510. As to the proper course to be taken in order to set aside a decree obtained by fraud, see *Mewa Lal Thakur* v. *Bhijhan, Jha, &c.* 13 B. L. R. Ap. 11.

[5] *Shedden* v. *Patrick*, 1 Macqueen's Scotch Cases, House of Lords, 535.

says Mr. Story,[1] "such acts or contracts, as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*." It is only in connection with the subject of *actual* or *positive* fraud that Mr. Story mentions frauds in verdicts, judgments, decrees, and other judicial proceedings.[2]

The following definition of *fraud* is given in the 17th section of the Indian Contract Act, IX of 1872, and may, perhaps, be usefully borne in mind :—

"Fraud" defined.

"Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1.)—The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;

(2.)—The active concealment of a fact by one having knowledge or belief of the fact ;

(3.)—A promise made without any intention of performing it ;

(4.)—Any other act fitted to deceive ;

(5.)—Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence in itself is equivalent to speech."—

Collusion.

"Collusion" has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds,—(1) when the facts put forward as the foundation of the judgment of the Court do

[1] Equity Jurisprudence § 258.

[2] Equity Jurisprudence § 252.

not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.[1]

Who may show Fraud or Collusion.

That *strangers* to the suit in which a judgment has been obtained by fraud or collusion may give evidence of such fraud or collusion for the purpose of defeating the judgment, is a proposition as to which there has never been any doubt; but, whether an innocent *party* to the suit may show such fraud and collusion, is a point upon which the authorities under English law are not agreed. It is said that his proper course is to apply to the Court which pronounced the judgment to vacate it. That a guilty party would not be allowed to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court is wholly in accordance with the legal maxims—*Allegans suam turpitudinem non est audiendus*[2]—*Nemo ex dolo suo proprio relevatur, aut auxilium capiat.*[3] The words of the section, "*any* party to a suit or other proceeding, &c." are wide enough to include parties to the first suit, both innocent and guilty. It may be questionable if it was intended to include the latter; but see *Ram Saran Singh and others* v. *Mussamat Pran Piyari and others*, 1 W. R. Civ. Rul. 156.]

Opinions of third persons when relevant.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art [or in questions as to identity of handwriting[4]], are relevant facts.

Such persons are called experts.

Illustrations.

(*a*.) The question is, whether the death of A was caused by poison.

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[1] See Wharton's Law Lexicon, Title "Collusion."

[2] "A person alleging his own infamy is not to be heard."

[3] "No one can be relieved or gain an advantage from his own deceit."

[4] The words in brackets were added by the amending Act, XVIII of 1872.

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b.*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c.*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

[As to *foreign law*, see also section 38, *ante*, p. 169. In connection with the same subject may be considered the provisions of 22 & 23 Vict. Cap. 63 ; and 24 Vict. Cap. 11. The preamble to the former Statute recites that great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof. Section 1 then enacts that if in any action[1] de pending in any Court within Her Majesty's dominions, it shall be, in the opinion of such Court, necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions *on any point on which the law of such other part is different* from that in which the Court is situate, it shall be competent to the Court to *direct a case to be prepared* setting forth the facts, as they may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that

22 & 23 Vict. Cap. 63, A.D. 1859.

[1] "Action" is defined by section 5 to include every judicial proceeding instituted in any Court—Civil, Criminal, or Ecclesiastical.

purpose in the event of the parties not agreeing; and upon such case being approved by such Court or a Judge thereof, they *shall settle the questions of law arising out of the same on which they desire to have the opinion* of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, *being one of the superior Courts thereof*, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act. The parties may petition the Court, whose opinion is to be obtained, to hear them or their counsel; and the Court shall, if it see fit, appoint an early day for hearing them, and shall pronounce its opinion. A copy of the opinion, so pronounced, certified by an officer of the Court, shall be given to each of the parties (section 2), who may lodge the same with an officer of the Court in which the action may be depending, with a notice of motion that such party will on a certain day move the Court to apply such opinion to the facts set forth in the case, and the Court shall thereupon apply such opinion to such facts in the same manner as if it had been pronounced by the Court itself upon a case reserved for its opinion; or the Court may, if it think fit, order the opinion to be submitted to the jury with the other facts of the case, as evidence, or conclusive evidence, as it may think fit, of the foreign law therein stated (section 3).[1]

24 Vict. Cap. 11, A.D. 1861.

The preamble to the 24 Vict. Cap. 11, referring to the above Statute, recites that it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any *foreign country or State with the Government of which Her Majesty may be pleased to enter into a convention for the* purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within Her Majesty's dominions, and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State. Section 1 then makes provisions similar to those above-mentioned, empowering superior Courts within Her Majesty's dominions, in any action depending in them, to remit a case with queries to such superior Court in such foreign State or country as shall be agreed upon in the convention.

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[1] As an example of a case in which the provisions of this Statute were resorted to, see *Login and another* v. *Princess Victoria Gouramma of Coorg*, 1 Jur. O. S. 109. The Court of Chancery in England here forwarded a case on Hindú law to the Supreme Court at Calcutta.

The provisions as to obtaining a copy of the opinion delivered by the foreign Court, and moving the Court in which the case is depending to apply it, are similar to those already noticed. Then follows a proviso (section 2) empowering the latter Court, if it be satisfied that the facts were not properly understood by the foreign Court, or if it be doubtful on any ground whether the opinion does correctly represent the foreign law as regards the facts to which it is to be applied, to remit the case with or without alterations or amendments to the same or to any other such superior Court in such foreign State as aforesaid. Section 3 empowers *any Court* of a foreign country or State, with whose Government Her Majesty shall have entered into a convention, to remit to the Court in Her Majesty's dominion, whose opinion is desired, a case setting forth the facts and the question of law arising out of the same, and directs such Court to proceed to pronounce an opinion and to give a certified copy thereof to the parties in manner similar to that provided for by the above Statute first mentioned. It may be observed that, under the provisions of the 22 & 23 Vict. Cap. 63, any Court, superior or inferior, may obtain the opinion on a question of law of a superior Court in another portion of Her Majesty's dominions; whereas, under the 24 Vict. Cap. 11, it is only a superior Court in Her Majesty's dominions which can obtain the opinion of a foreign Court, while it appears that any foreign Court, superior or inferior, can obtain the opinion of a Court, superior or inferior, in Her Majesty's dominions.

With reference to experts in science, art, or handwriting, Mr. Taylor says:—"It may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature. On the other hand, it seems equally clear that the opinions of skilled witnesses cannot be received when the enquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it. Therefore, witnesses are not permitted to state their *views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced* had the parties acted in one way rather than another . . . . The opinions of scientific witnesses are admissible in evidence not only where they rest on the personal observations of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case as proved by other witnesses* on the trial. But here the witness cannot,

What is a Science or Art?

in strictness, be asked his opinion respecting the very point which the jury" (or in India the Court) "are to determine. For instance, if the question be whether a particular act for which a prisoner is tried were an act of insanity, a medical man conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; *because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.*"[1] He may, however, be asked what judgment he can form on the subject, *assuming the facts stated in evidence to be true.* As to the opinions of experts, see also the penultimate paragraph of section 60, *post.*[2]

Evidence of experts to be received with caution.

The evidence of *experts* is to be received with considerable caution, not because they have been found by experience to wilfully misrepresent what they think, but because their judgments become to a certain extent warped from regarding the subject in one point of view, so that, though most conscientiously disposed, they are incapable of expressing a correct opinion. "They come," said Lord Campbell, "with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."[3] As to the opinion of experts, see also the first proviso to section 60, *post.*]

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

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[1] §§ 1275, 1276, and 1278.

[2] In America it has been determined, upon grave consideration, and in conformity with the doctrine which has always prevailed in the English Ecclesiastical Courts, that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose not only to particular facts, but to 'is *opinion* or belief as to the sanity of the party formed from such actual observation. And s al- th- subscribing witnesses to a will may give their opinion as to the sanity of the testator (see Tay. § 1273 and cases their cited). This evidence does not seem to be admissible under the Indian Evidence Act, which allows the *opinions* of *experts only* on such a point. Of course, any witness may speak t- *facts*, from which the Court may form its own opinion as to sanity or insanity (see section 14).

[3] Tracy Peerage Case, 10 Clark and Finnelly's Rep. 191.

Illustrations.

(*a.*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b.*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

[This section is in accordance with the rule of English law, see Taylor on Ev. section 316. It is somewhat analogous to section 11, *ante*. Illustration (*b*) is taken from the case of *Folkes* v. *Chadd*, 3 Douglas' Rep. 157.]

Opinion as to handwriting.

47. When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the hand writing of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

Five methods of proving handwriting.

[There are five methods of proving handwriting:—(1) The simplest method is to call the *writer* himself. It is not, however, absolutely necessary to call the writer, as the testimony of any one who saw him write is, equally with his, primary evidence of the fact. (2) Any person who *actually saw the paper or signature written* may be called to prove it. (3) A witness may be called who has obtained a knowledge of, and acquaintance with, the person's handwriting in question by seeing that person write on other occasions. (4) The handwriting may be proved by the evidence of a witness who has acquired a knowledge thereof by having seen *in the ordinary course of business* documents proved, or which may be reasonably presumed to have been written by the person, whose handwriting forms the subject of inquiry (see *Explanation* and *Illustration*). In the *Fitzwalter Peerage* case[1] it was decided that the evidence of a witness, who had acquired his knowledge of the handwriting not from *a course of business*, but from studying the signatures attached to documents admitted or proved to be genuine, but *not produced*, for the *express purpose* of speaking to the *identity of the writer*,[2] could not be admitted. But when the family solicitor was called and stated that he had acquired a knowledge of the handwriting from having had occasion at different times to examine, *in the course of business*, many deeds and other instruments written or signed by the same ancestor, this was held to be good evidence. (5) Handwriting may be proved by comparison of two or more writings, as to which see section 73, *post*, and as to comparison by experts, section 45, *ante*, and Illustration (*c*) thereto.

The methods of proving handwriting are valuable probably in the order in which they have been placed above. Where a less valuable

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[1] 10 Clark and Finnelly's Rep. 193.

[2] Which is different from the *identity* of *handwriting* (see section 45, *ante*); the writings to be compared being before the Court (see Illustration (c), *id*).

method of proof is resorted to, it should be borne in mind that this may raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature, if it do not appear that such evidence is not readily available.]

Opinion as to existence of right or custom when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

[Under clause 4, section 32 (*ante*, pp. 143, 162–165) evidence may be given of a *statement, written or verbal*, made by a person, who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appear to the Court to be unreasonable, *such statement giving the opinion* of such person as to the existence of any *public right or custom or matter of public or general interest*, of the existence of which, if it existed, he would have been likely to be aware, and having been made *before any controversy* as to such right, custom, or matter arose. The present section (48) is concerned with oral evidence given in open Court by the person expressing the opinion, and is not governed by the limitation "before any controversy, &c." Having advertence to the meaning attached to the terms "*public*" and "*general*" as explained *ante*, p. 162, the *Explanation* adopts the sense in which the term "*general*" is used by English writers. The Indian Evidence Act, however, makes no provision for the admission of oral evidence, expressing the opinion, as to the existence of a *public custom or right*, of persons who would be likely to know of its existence, if it existed. Why oral evidence of opinion should be admitted in the case of a *general, though not of a public custom or right*, is not very obvious,

It may perhaps be said that every public custom or right is a general custom or right, though the converse of this proposition would not hold good. It may be observed that the Act declares judgments, orders, or decrees to be relevant when they relate to *matters of a public nature* (section 42), but that there is no provision for admitting them as evidence of *matters of general interest*. See also as to *custom, right*, &c., section 13, *ante*, p. 93; and clause 7, section 32, *ante*, pp. 144—172.]

Opinions as to usages, tenets, &c., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

[As to family custom, see *ante*, pp. 100—102.

As to Religious or Charitable foundations, see Bengal Regulation XIX of 1810; Madras Regulation VII of 1817; Act XX of 1863; Act VII (Bom. C.) of 1865; and the cases cited in the note at foot of page 102, *ante*.

The portion of the section which relates to the *meaning of words or terms* is particularly valuable in a country like India, in which there are so many different languages, and in which justice is largely administered by Englishmen in languages other than English. A Judge may also consult a dictionary as to the meaning of a word. See the penultimate para. of section 57, *post*.]

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage

in proceedings under the Indian Divorce Act, or in prosecutions under section four hundred and ninety-four, four hundred and ninety-five, four hundred and ninety-seven, or four hundred and ninety-eight of the Indian Penal Code.

Illustrations.

(*a.*) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b.*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

[The provisions of this section are in accordance with English law, see Tay. §§ 517, 584, and the cases there cited. See also section 8, *ante*, p. 86: and the observations as to family conduct at p. 170, *ante*.

The presumption of Muhammadan law is so strong in favor of legitimacy that very little evidence of a child being treated as a legitimate child will suffice to prove legitimacy. The following cases may be consulted, *viz.*: — *Khajah Hidayatúla* v. *Rai Jan Khanum*, 3 Moo. Ind. App. 295: *Mahomed Bakhir Hosen Khan Bahadur* v. *Sharafanissa Begam*, 8 Moo. Ind. App. 136: *Mussamat Nawabanissa and others* v. *Mussamat Fazlúnissa*, Marsh. Rep. 428: *Ashrafanissa* v. *Mussamat Azíman*, 1 W. R. Civ. Rul. 17: *Rani Roshan Jahan* v. *Raja Syud Enayat Hossein*, 5 W. R. Civ. Rul. 4: *Jeswat Singhji* v. *Jet Singhji*, 3 Moo. Ind. App. 150.]

Grounds of opinion when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

[The correctness of the opinion or otherwise can better be estimated in many instances when the grounds upon which it is based are known. In *Stephenson* v. *The River Tyne Commissioners* (17

W. R. 590) it was held that a skilled witness may not only say that he formed an opinion, but that he *acted on that opinion*, his acting thereon being a strong corroboration of the truth of the opinion. What a person does is usually better evidence of his opinion than what he says. This evidence would doubtless be admissible under section 8, or under section 11, *ante*.]

CHARACTER WHEN RELEVANT.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases, character to prove conduct imputed irrelevant.

["As evidence of general character can, at best, afford only a glimmering light, when the question is whether the party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings, in which it was originally received *in favorem vitæ*.[1] . . . . . A distinction has, however, been taken between cases where particular acts of misconduct are imputed to a party, and those where his *general conduct is put in issue*: and though evidence of character is rejected in the former, it has several times been admitted in the latter class of cases. Thus, in an action for a libel contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being lady-like or good tempered," general evidence was given of her competency, good temper, and manners, by witnesses who were her personal friends; and, on the same principle, where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness with whom she had formerly lived was allowed to testify to her antecedent good conduct."[2] "Let a man think," says Blair, "what multitudes of those among whom he dwells are totally ignorant of his name and character; how many imagine themselves too much occupied with their own wants and pursuits to pay him the least attention." And even among those intimate relations, who know a man the best, how very few are really acquainted with his inner mind and disposition. It is, therefore, truly but a glimmering

[1] "In favor of life."

[2] Tay. §§ 328, 329.

light that can be thrown by such evidence upon the probability or improbability of a man's having done a particular act.[1]]

In criminal cases, previous good character relevant.

53. In criminal proceedings, the fact that the person accused is of good character, is relevant.

[Evidence of good character for the defence may be given either by cross-examining the witnesses for the prosecution, or by calling witnesses on behalf of the accused. As to these latter, see section 140, *post*. The above section is in conformity with English law. "Though general evidence of bad character," says Sir J. Stephen, "is not admitted against the prisoner, general evidence of good character is always admitted in his favor. This would, no doubt, be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to *explain conduct*. A loses his watch; B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is a very poor excuse; but if B is a friend of A's, and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance, to the Rector of the parish, being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries that evidence of character cannot be of use where the case is clearly proved except in mitigation (or, possibly, aggravation) of punishment; but that, if they have any doubt,[2] evidence of character is highly important. This always seems to me to be equivalent to saying, 'If you think the prisoner guilty, say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather the more readily because of it.' Evidence of character would thus be superfluous in every case. *The true distinction is that evidence of character may explain conduct, but cannot alter facts.*"[3] Where the act done is in itself indifferent, or in other words, where the

[1] Clause 2 of section 11 would have admitted this evidence in civil cases but for the excluding provisions of section 52.

[2] "When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and, therefore, in this event alone will the jury be advised to act upon such evidence." Tay. § 326.

[3] *General View of the Criminal Law of England*, pp. 311, 312.

act amounts to an offence only by reason of being done with a *vicious intention*, evidence of character is valuable as to the probability or otherwise of the existence of such an intention. Where, on the other hand, the intention is of the essence of the act, such evidence may be of use, only if it be doubtful whether the prisoner was the person who committed the act.]

Previous conviction in criminal trials relevant, but not previous bad character, except in reply.

54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence, is relevant; but the fact that he has a bad character, is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

[The rule, well-established under English law, that general evidence of bad character cannot in the first instance be given for the prosecution and against a prisoner, has been followed in India, even before the enactment of the Evidence Act. (*The Queen* v. *Beharí Dosádh and others*, 7 W. R. Crim Rul. 7: *The Queen* v. *Gopal Takur*, 6 W. R. Crim. Rul. 72: *The Queen* v. *Phúlchand and another*, 8 W. R. Crim. Rul. 11.) "A man's general bad character," says Sir J. Stephen, "is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people; whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons. If general bad character is too remote, *â fortiorí* the particular transactions of which that general bad character is the effect are still further removed from proof; accordingly it is an inflexible rule of English criminal law to exclude evidence of such transactions."[1] When, however, with a view of raising a presumption of innocence, witnesses to good character are called for the defence, the prosecution may rebut this presumption *either* by cross examining these witnesses (section 140, *post*) as to particular facts or as to the grounds of their belief, *or* by calling separate witnesses of bad character. The latter course is, in practice, seldom resorted to in England, and on one occasion such

[1] *General View of the Criminal Law of England*, pp. 309—310.

evidence was rejected.[1] The Act as originally drafted contained the following additional section dealing with the subject of character:—

"In trials for rape, or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute, or that her conduct was generally unchaste, is relevant."

Character for chastity in trials for rape.

It was, however, thought unnecessary to retain this as a separate section, and it was accordingly incorporated with section 155, *post*—see clause 4 thereof.

"*In criminal proceedings the fact that the accused person has been previously convicted of any offence, is relevant*"—this provision is not in accordance with English law, under which such evidence can be given only in reply to evidence of good character offered for the defence, and cannot be given in the first instance as part of the prosecution.[2] The effect of this new provision will be that, for whatever criminal offence a person is on his trial, a previous conviction for any other offence, however dissimilar in character, may be offered as evidence against him. The value of such evidence will vary greatly. The probability of a man's having committed a *forgery* cannot be much increased by showing that he was previously convicted for *rape* or *assault*. The truth of a charge of *coining* will not be rendered more likely by evidence of a conviction for *adultery*:[3] nor will proof of a conviction for selling goods with a *counterfeit trade-mark* be of much use when the prisoner is being tried for *kidnapping*. Where, however, both offences are of the same class or denomination, it is impossible not to say that this evidence will in many cases have a certain value. As to the mode of proving previous convictions, see *ante*, p. 300.

Previous conviction always relevant.

From the above provisions, which admit previous convictions as evidence in all criminal cases, must be distinguished the following clause of section 439 of the Code of Criminal Procedure, Act X of 1872:—

"If the accused person has been previously convicted of any offence, and if it is intended to prove such previous conviction *for the purpose of affecting the punishment* which is to be awarded, the fact of the previous conviction must be stated in the charge. If it is

Previous conviction to be set out in charge.

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[1] *Reg.* v. *Burt*, 5 Cox's Criminal Cases, 284.

[2] To the general rule of English law above stated there is a recent exception, 32 & 33 Vict. ("The Habitual Criminals Act"), Cap. 99, Sec. 11, which allows such evidence in order to prove guilty knowledge in cases of receiving stolen goods.

[3] Under the *Indian* Penal Code, this is a criminal offence.

omitted, it may be added at any time before sentence is passed, but not afterwards."

This should be read in connection with section 75 of the Indian Penal Code, which enacts that "Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not in any case be liable to imprisonment for a term exceeding ten years"—and in connection with sections 3 and 4 of the Whipping Act VI of 1864, which provide for the punishment of whipping *in lieu of* or *in addition to* other punishment on the occasion of a second conviction for one of certain specific offences.

In connection with Courts-Martial, to which the Evidence Act is applicable (section 1), see Article 117, Act V of 1869.

The *Explanation* may be read in connection with Chapter XXXVIII (sections 504—517) of the Code of Criminal Procedure, Act X of 1872; under which persons of known bad or dangerous character in the Mufassil may be called upon to give security for good behaviour, and, in default thereof, may be imprisoned.]

Character as affecting damages.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In sections fifty-two, fifty-three, fifty-four, and fifty-five, the word 'character' includes both reputation and disposition; but evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown.

[Where a husband sues for damages on the ground of adultery, or a father on the ground of seduction, compensation is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruining his domestic happiness. The damages should, therefore, be commensurate with this pain, which must vary according as the character of wife or daughter had been previously unblemished or otherwise. In such cases, under English

law, evidence not only of *general* bad character, but also of *particular* acts of immorality is admissible. The above section would, however, appear not to contemplate cases of this kind, inasmuch as the person whose character is in question is therein assumed to be the same as the person who claims damages. This evidence may, however, be admissible under section 12, *ante*, p. 93. The same remarks apply to evidence called by the defendant, in an action by a husband for damages for alleged adultery with his wife, to show that the husband had neglected his wife, turned her out of doors, refused to maintain her, had himself been guilty of dissolute conduct, &c.

Some cases under English law.

The following are some of the questions which have been raised in England on the principle with which the section now under discussion is concerned. There has been considerable doubt whether, in an action for defamation, evidence can be admitted to impeach the plaintiff's previous general character, and to show that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant. Mr. Taylor discusses the question in the fourth edition of his work (§ 333), and arrives at the conclusion that the weight of authority inclines slightly in favour of the admissibility of this evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea.[1] He points out that the arguments against admissibility mainly turn upon proving *particular acts of misconduct*, and that they have little force where evidence is offered merely of *general reputation*. The above section of the Indian Evidence Act is in accordance with this view. In actions for breach of promise of marriage it has never been doubted but that the defendant may show, in mitigation of damages, that the plaintiff is a person of bad character. In an action for damages for malicious prosecution, Lord Kenyon allowed a witness to be asked, with a view of showing probable cause, whether the plaintiff was not a man of notoriously bad character. Lord Kenyon's view has been adopted in the Indian Evidence Act. In an action for defamation, it has always been held that a plaintiff cannot, in the first instance, give general evidence of good character in aggravation of damage, the presumption of law being already in his favour: but he may give such evidence to rebut evidence of the contrary offered by the defendant. It may be that this rule will be affected by the above section.

With reference to the *Explanation*, 'reputation' signifies what is

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[1] But see *Thompson* v. *Nye*, 17 Adolphus and Ellis' Rep. 175; S. C. 15 Jur. 285.

thought of a person by others, and is constituted by public opinion.[1] 'Disposition' comprehends the springs and motives of actions, is permanent and settled, and respects the whole frame and texture of the mind.[2] Both reputation and disposition lie in the general habit of the man rather than in particular acts or manifestations. *Evidence may be given only of general reputation and general disposition.* The proper form of question to the witness is—"From your knowledge of the plaintiff or prisoner," as it may be, "does he bear a good character for honesty, &c.?" "From your knowledge of his general character, do you think, &c.?"

Weight of evidence distinct from admissibility.

With this section ends that portion of the Act which is concerned with the *Relevancy of Facts.* The draft Bill prepared by the Commissioners (see *ante*, p. 18) contained the following section:—"When any fact is herein declared to be relevant, it is not intended to indicate in any way the weight, if any, which the Court shall attach to it, this being a matter solely for the discretion of the Court." It was not thought necessary to retain this express provision in the new Act, but the principle expressed therein should none-the-less be borne in mind. The question of the admissibility or relevancy of evidence is wholly distinct from the weight which is to be assigned to it when admitted.

English text-writers treat of the principles which govern the production of evidence under the four following rules, *viz.*:—

1*st*,—The evidence must correspond with the allegations, but it will be sufficient if the substance of the issues be proved.

2*nd*,—The evidence must be confined to the points in issue.

3*rd*,—The burden of proof lies on the party holding the substantial affirmative.

4*th*,—The best evidence must be given.

The *second* of these rules corresponds with Part I of the Act, which treats of the *Relevancy of Facts.* The *third* will be found comprised in the provisions of Chapter VII, Part III, *post.* The *fourth* forms the substance of Chapters IV and V, Part II, *post.* The *first* has not, how-

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[1] See *Crabb's Synonymes:* "It is possible for a man to have a fair *reputation* who has not in reality a good *character*; although men of really good *character* are not likely to have a bad *reputation.*"

[2] "*Disposition* respects the whole frame and texture of the mind; *temper* respects only the bias or tone of the feelings. *Disposition* is permanent and settled; *temper* may be transitory and fluctuating. The *disposition* comprehends the springs and motives of actions; the *temper* influences the action of the moment. It is possible and not unfrequent to have a good *disposition* with a bad *temper*, and *vice versa.*"—*Idem.*

ever, been incorporated with the Act, no doubt because it was considered to be a rule of *Procedure* rather than of *Evidence*. As, however, most writers on the subject of *Evidence* give this rule a place in their treatises, it will not be inconsistent with the design of this work to say a few words as to its meaning and application, more especially as the neglect of this particular rule in India has on more than one occasion formed the subject of comment by the highest Courts of Appeal. Mr. Taylor, speaking with reference to the state of things in England, says as follows:—"The pleadings at Common Law are composed of the written allegations of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the *issues*. If these are propositions of fact, they must, as a general rule, be tried by the jury, and the first rule which it is important to remember is the above.[1] As one of the main objects of pleading is to apprize the parties of the specific nature of the question to be tried, and as this object would be defeated if either party were at liberty *to prove facts essentially different from those which he has stated on the record, as constituting his claim or charge on the one hand or his defence on the other*, the necessity of establishing such a general rule as the present becomes apparent, and the only remaining question concerns its limitation and extent." "It is not only necessary," says Mr. Macpherson, "that the substance of the case set up by a party should be proved; it must be essentially the same case, and not a different case: for the Court will not allow a man to be taken by surprise by a case proved on the other side, which, though plausible in itself, is different from that which was set up. There must be a direct and real conformity, though not perhaps a minute literal conformity between the proofs and the allegations: parties who come for the execution of agreements must state them as they ought to be stated, and not set up titles which they cannot support. Thus a party should not set up a general title, such as inheritance, and then seek to recover under a particular deed merely . . . . . When a man advances one set of claims and establishes another, Judges are very often tempted to take irregular courses for the purpose of saving further litigation. But it is reasonable and just that the rights of parties litigating should be decided *secundum allegata et probata* (according to what is averred and proved); and it has been well observed, that attempts to reach the supposed equity of each case by departing from the rules which have been established for the purpose of maintaining and

Decision must be *secundum allegata et probata.*

[1] *i. e.* "the evidence must correspond with the allegations, but the substance only of the issues need be proved."

administering justice, generally lead in the particular cases to results which were never contemplated, and introduce disorder, uncertainty, and confusion into the general practice of the Court."[1]

In the case of *Srimati Dasi* v. *Rani Lalan Mani* (12 Moo. Ind. Ap. 475) the members of the Privy Council said:—"Their Lordships cannot but feel that it would be most mischievous to permit parties, who had had their case upon one view of it fairly tried, to come before this Board and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below." In the case of *Eshan Chandra Singh* v. *Shamacharan Bhatta* (11 Moo. Ind. Ap. 21), the following observations were made: "This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded *upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.* Unfortunately in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid not only of allegation, but also of evidence in support of it. The case made by the plaintiff alleges a distinct agreement between the plaintiff and two brothers - Kailass and Eshan—that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease, which was put up by a zemindar to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by *Kailass* on his own behalf and on behalf of *Eshan* and on behalf of the plaintiff, and that, in conformity with the agreement between the three, *Kailass* subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of *Kailass* having no interest and acting in the transaction as agent only of Eshan. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between *Kailass* and *Eshan* of principal and agent, and from the alleged fact of Kailass, in the execution of his authority, having given certain rights and interests to the plaintiff without which his principal (Eshan) would not have been able to obtain the property

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[1] *Civil Procedure*, 4th edition, pp. 219—220: and see *Saroda Sundari Debi* v. *Gobind Mani* alias *Brojo Sundari Debi*, 24 W. R. 179, where a Judge was held to have been in error in giving an appellant more than she claimed in her petition of appeal.

in question. But the difference between the two grounds of relief and between the two kinds of cases is plain. . . . . These facts being established by the judgment, and being, therefore, binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment . . . . . It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove . . . . . Their Lordships . . . . . desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."[1] In the case of *Muhammed Zahúr Ali Khan* v. *Mussamat Takuráni Rutta Koer* (11 Moo. Ind. Ap. 473) the following observations were made:—"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings." In *S. M. Nistariní Dasí* v. *Makhan Lal Dutt* (9 B. L. R. 29), Couch, C. J. remarked that the principles enunciated in the judgments in the last two cases are wholly in accordance with the rule observed in Courts of equity—that, if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer for general relief, provided it is such relief as is agreeable to the case made by the plaint. In the case of *W. R. Arbuthnot and others* v. *C. D. Betts and others* (6 B. L. R. 274) the same authority observed as follows:—"The Judge, I think, was wrong in saying that he was bound to try the suit in the manner in which the plaintiffs framed their plaint. The object of the plaint is to bring the matter in dispute between the parties before

[1] See these remarks quoted and applied in *Jawadanissa Satudai Khandan, &c.* v. *Jhaman Lal Misser*, &c. 23 W. R. 159: and *Chova Kara* v. *Isabin Khalifa*, I. L. R. 1 Bom. 209.

the Court ; but, upon the settlement of issues, the Judge is to ascertain what is the real question to be tried : and at the hearing, if he can, either upon the issues already framed or upon amended issues, determine that question, he ought to do so . . . . . I think that the Procedure Code does not prescribe or even encourage parties to do anything more than state broadly and simply the facts upon which they rely and the relief which they ask for. The Procedure Code, it appears to me, does not limit the parties to particular forms of action ; and, provided that the facts upon which the plaintiffs rely are fully disclosed in the plaint and written statement, it rests entirely upon the Court to attach the legal consequences to those facts, and award to the plaintiffs the relief to which those facts entitle them." The facts may not be sufficiently stated in the plaint, in which case it is the duty of the Court, when fixing the issues, to elicit all that is necessary to raise the real questions in dispute between the parties ; or the plaintiff, while setting out the real facts, may not exactly conceive or ask for the particular remedy which is available upon those facts, in which case the Court should not deny him any remedy at all because he has not specially asked the remedy which he can have. But either of those cases is very different from setting up in a later stage of the proceedings a wholly different state of facts, and thus shifting the cause of action. In the language of their Lordships of the Privy Council, *the state of facts and the equities and ground of relief originally alleged and pleaded must not be departed from.* This principle may well be illustrated by a few examples. In *Amiranissa Khatún* v. *Abedúnissa Khatun* (L. R. 2 I. A. 87), a Muhammadan father and mother had made a gift of certain property to their infant son. Subsequently this son was said to have executed an *ikrar* to his father, making his probable brothers and sisters co-heirs in some of this property, and another similar *ikrar* to his mother in respect of the portion given by her. On attaining majority, he was said to have executed a third *ikrar*, confirming the two previous *ikrars*. He afterwards brought a suit to set aside these three *ikrars* as forged, and to obtain possession with mesne profits of the property which had formed the subject of the gift. The two earlier *ikrars* were found to be genuine, and the Privy Council held that the Appellate High Court was in error in declining to give effect to them on the ground that they were executed by an infant and under undue influence; when neither the plaint nor the issues had directly raised these points, and when no evidence had been taken relating thereto. See also *Browne* v. *M'Clintock* (L. R. 6 H. L. 434). When a plaintiff seeks to establish a specific title based upon specific grounds, as, for example, a *mukarrari patta* or the like, and fails to prove this title, he cannot be allowed to

succeed merely because he appears to have been more than twelve years in possession, the question of a title based upon twelve years' adverse possession not having been raised either in the plaint or in the issues (*Bejaya Debya* v. *Beidonath Deb*, &c. 24 W. R. 444: *Shiro Kumari Debi* v. *Gobind Sheo Tanti*, I. L. R. 2 Calc. 418). A Hindú sued to set aside a certain alienation on the ground that the alienor was an illegitimate son of the plaintiff's grandfather, and therefore had no interest in the property. Failing to substantiate this ground in the first Court, he contended in appeal that the alienation was bad, because, under the Mitakshara law, the owner of a share in a joint ancestral estate is not competent to alienate his share without the consent of the other heirs. It was held that he could not be allowed to shift his ground in this manner (*Srí Persad* v. *Raj Gúrú Triambaknath Deo and others*, 6 B. L. R. 555).[1]

The plaintiffs were second mortgagees who had foreclosed their mortgagors' equity of redemption, and they sued for possession of the mortgaged property, alleging that the mortgagors' equity of redemption had been finally foreclosed by the first mortgagee (who was their mortgagor), after due proceedings and expiry of the year of grace without redemption; and that they were, therefore, entitled to absolute possession. They failed on the ground that notice of foreclosure had not been duly served; and it was held that they could not obtain a decree as mortgagees for possession, subject to their accounting to the mortgagors, this relief being different from that prayed for in their plaint (*The Bank of Hindustan, China, and Japan* v. *Shoroshibala Debi*, I. L. R. 2 Calc. 311). When a lessor sues to eject his tenant on the expiration of his term or for breach of the conditions of the lease, and fails to prove the

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[1] See also *Sheo Das Narain Singh* v. *Bhagwan Dutt and others*, 2 B. L. R. App. 15: *Kali Mohan Chattapadhya* v. *Kali Krishna Rai Chaudhri*, 2 B. L. R. App. 39 (here the new point taken manifestly arose out of the facts alleged): *Uma Sundari Dasi* v. *Dwarkanath Rai*, 2 B. L. R. 288: *Jagobandhu Deb* v. *Goluk Chandra Haldar*, 10 W. R. 228: *Hira Lal Malik* v. *Matilal Malik*, 5 B. L. R. 682: *Sheikh Titu* v. *Sheikh Bitan*, Marsh. Rep. 47 (suit for money on an *ikrar*: *ikrar* not proved: plaintiff held not entitled to recover): *Verasvami Gramini* v. *Ayyasvami Gramini*, 1 Mad. Rep. 471: *Bisji Bibi* v. *Monohur Das*, 2 Jur. N. S. 118: *Lalji Rattanji* v. *Gangaram Bin Tuljaram*, 2 Bom. Rep. 148: *Madhu Sudhan Goswami* v. *Hills*, 10 W. R. 242: *Athar Hosen*, &c. v. *Ramphal Rai*, 20 W. R. Civ. Rul. 75 (suit for *patta* corresponding to kabuliyat said to have been taken by twelve-anna sharers. Held that, on failure to prove this allegation, a *patta* at a fair and equitable rent could not be given. Plaintiffs came into Court on a special ground, and probably for this very cause there was no evidence upon which the question of a fair and equitable rate could be decided): *Kuer Golab Singh* v. *Rao Kuran Singh*, 10 B. L. R. 8 (P.C.): *Gopi Lal* v. *Mussamat Sri Chandraoli Bahúji*, 19 W. R. Civ. Rul. P. C. 13.

lease, he is not at liberty in the same suit to fall back upon his general title (*Lakshmibai* v. *Haribin Ravji*, 9 Bom. H. C. Rep. 1: *Sheikh Wala Ali &c.* v. *Sheikh Golam Gous*, 10 B. L. R. Appen. 32). It was remarked in the former case that, as a general rule, "a party must be limited to the case which he puts forward in his plaint. He may indeed, from the commencement of the suit, put forward in his plaint an alternative case, and thus the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such order as may to it seem just regarding the adjournment of the hearing and costs. But, as a general rule, a plaintiff must abide by his plaint." The principle here laid down by a Full Bench of the Bombay High Court was approved and followed by a Full Bench of the Calcutta High Court in *Lakhi Kanto Das Chaudhri* v. *Samirudín Lusker, &c.* (13 B. L. R. 243; S. C. 21 W. R. 209). This was a suit upon a kabúliyat to recover arrears of rent. The defendants denied the genuineness of the kabúliyat, but at the same time admitted the rate of rent, and pleaded payment. The kabúliyat was found to be spurious, but it was contended that the landlord was entitled to have a further inquiry as to whether any rent and how much was due to him on account of the raiyats' use and occupation of the land. In delivering the opinion of the Full Bench, Couch, C. J. said: —"Whether the landlord is entitled to this, or not, depends in our opinion upon the claim which is stated in the plaint. If the claim is in the alternative, and thus the raiyat has notice that the landlord, if he fails to prove the execution of the kabúliyat, will claim rent for the occupation of the land, we think an issue ought to be framed to try whether any rent, and how much, is due on account of the occupation, and that the landlord is entitled to have that issue tried. If any rent is due, the landlord ought to be allowed to recover it. It is not forfeited by his making a false claim upon a kabúliyat, and he should not be made to bring two suits when the question between him and the raiyat can be determined in one. But where a claim for rent on account of the occupation of the land is not made in the plaint, we think the landlord is not entitled to have the question tried whether any, and how much, rent is due . . . It is in the discretion of the Court to amend the plaint or the issues and allow it to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so —'If by inadvertence or other cause the recorded issue do not enable the

Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute' (*Hanúman Persad Panday* v. *Mussamat Babúi Munraj Kúnwari*, 6 Moo. Ind. Ap. 411). But where there is reason for thinking that the omission was deliberate, it would generally not be proper."[1] The case of *Nara Hari Mahant* v. *Narainí Dasi* (W. R. Spec. No. 23; S. C. Marsh. 70) was similar. The plaintiff sued for rent upon a kabúliyat, which was found to be a forgery. The Judge, however, "putting out of all sight the kabúliyat," gave a decree for rent at the rate which, after taking further evidence, he held to be proved. This decree was reversed by the High Court on appeal. Peacock, C. J. said:—"We are of opinion that the plaintiff was not entitled to recover. *It is a general rule that a plaintiff must prove his case as laid in his plaint or written statement.* If there is a variance between his statement and his proofs arising from inadvertence or mistake, the Court may allow the issues to be amended, but that is entirely at the discretion of the Court; and we think it would not be the exercise of a sound discretion to allow a party, who relies upon a document, to set up a fresh case when an issue as to the execution of such document is found against him, and there are good grounds for believing that the document is a forgery. Cases have occurred in which parties have attempted to support even a good case by forgery or perjury. If they fail in such attempt, they are very justly punished and are certainly not entitled to any indulgence from the Court. The plaintiff having failed in proving his case as originally stated is not entitled to succeed; and in this case there are no sufficient grounds for allowing an amendment."[2]

But where, in a suit for rent brought on a kabúliyat, the *raiyat*, though denying the kabúliyat, *admitted* a certain amount of rent to be due to the plaintiff, it was held that the plaintiff, even though he failed to prove the kabúliyat, was entitled to a decree for the admitted balance (*Rúkni Kanth Rai, &c.* v. *Sharihatúnissa Bibi, &c.* 20 W. R. 64; S. C. 13 B. L. R. 246 note). This case proceeded wholly on the ground of the admission (see 13 B. L. R. 250,253). The same principle was applied when the suit was for enhancement, and the defendant

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[1] In *Watson & Co.* v. *Dhonendro Chandra Mukherji* (I. L. R. 3 Calc. 6) the landlord had sued to set aside a *patni* lease. While this suit was pending, he sued for rent for use and occupation, but failed. Having also failed to set aside the lease, he sued thereupon for rent for the years in respect of which he had before sued for use and occupation. It was held that the matter was not *res judicata*, but the claim was barred by limitation.

[2] See also *Simru Karigar* v. *Anand Chandra Rai*, Marsh. Rep. 57; and, as to the defence to a suit, *Guru Dass* v. *Srishti Dhur Dey*, 2 R. J. and P. J. 200; also *Umesh Chandra Biswas* v. *Nilkamal Bandopadhya*, *id.* 356.

denying the right to enhance *admitted* a certain amount of rent to be due for the years which formed the subject of the claim (*Akashbati Koer* v. *Hira Ram Mandar*, 24 W. R. 82). When a zemindar sued to recover enhanced rent in pursuance of a notice of enhancement, it was held that, having failed to prove his right to enhance, he could not in that suit recover the rent specified in the kabúliyat by which the defendants were bound before the service of the enhancement notice. Their Lordships of the Privy Council were "of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely on different principles. To a suit for enhancement it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised, nor could an issue have been properly raised, in this suit as to whether the rent for 1272 at the rate specified in the kabúliyat had been paid or satisfied: nor is there anything in the case to show whether it has been paid or not. Their Lordships are of opinion that the plaintiff is not entitled to a decree in this suit for the rent of 1272 at the rate fixed by the kabúliyat" (*Súrasundari Debí &c.* v. *Gulam Ali*, 19 W. R. 142: followed in *Jageshar Tati* v. *Ishan Chandra Ghose, &c.*, 20 W. R. 186: and *Saroda Mohan Rai Chaudhri* v. *Shibopúrí Dasi, &c.*, 24 W. R. 35).

The principle under consideration was, under the old rules of pleading in England, applied with such *pedantic* strictness as to occasion, both in civil and criminal cases, great failures of justice, the least variance even in matters not directly bearing on the issue having been held fatal. But the Legislature interfered, and laid down rules of broad justice, which have been universally approved, and the spirit of which has been followed in the preparation of the Indian Codes. *The power of amendment* conferred on the Judges was one of the principal means used for the acquirement of this desirable end. The following are the provisions of the Code of Civil Procedure on this subject.

The plaint may, at the discretion of the Court, and at or before the first hearing, be rejected, returned for amendment within a time to be fixed by the Court or amended then and there, upon such terms as to the payment of costs occasioned by the amendment as the Court thinks fit, (*a*) if it do not state correctly and without prolixity the several particulars hereinbefore required to be specified therein; or (*b*) if it contain any particulars other than those so required; or (*c*) if it be not subscribed and verified as hereinbefore required; or (*d*) if it do not disclose a cause of action; or (*e*) if it is not framed in accordance with Section 42; or (*f*) if it is wrongly framed by reason of nonjoinder or misjoinder of parties, or because the plaintiff has joined causes of action which ought not to be joined in the same suit. Provided that a plaint

cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character (section 53).

Power of amendment.

The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for the purpose of determining *the controversy between the parties* shall be so made or framed section 149).

In the case of *Govind Máhápátur and others* v. *Mádhab Persád Pandit* (6 W. R. Civ. Rul. 211) the scope of Section 141 of the old Code, which substantially corresponds with the above Section 149, was discussed by the Calcutta High Court; and it was said that the "power of a Court to amend a plaint extends by a *vivâ voce* examination to the elucidation of what is ambiguous, to the amendment of what is erroneous, and to the supplying of what is defective; but not to the conversion of a suit of one character into another inconsistent with and opposed to the remedy at first asked for."

In the case of *Sheikh Mahomed Ríza-ú-dín* v. *Hosein Baksh Khán* (1 W. R. Civ. Rul. 300), the plaintiff, alleging a contract of partnership, which he failed to prove, sought to recover some 3,000 rupees from the defendant. The latter admitted the receipt of money from the plaintiff as a deposit repayable by him, and on this admission the plaintiff was declared entitled to a decree for the balance of the advance still due to him. *Campbell, J.* remarked as follows:—"I am decidedly of opinion that the object of the new Procedure being to do away with strict rules of pleading and technicalities of all kinds, it is not necessary to keep parties very strictly to their written pleas further than the interests of broad justice and morality require; and that it is right that the Judge should simply find the real questions upon which the parties are at issue, and try those questions. Here it was admitted on both sides, that money of the plaintiff's had been received by the defendant, and was repayable to him upon an account. The question between the parties was, whether defendant had agreed to share the profits of his business with plaintiff, and to pay those profits in addition to the money received. I think it is unfair and unnecessary that, because plaintiff has essayed to prove something more than the money count, and has failed to prove that additional claim, he should, therefore, also lose the money which is clearly due to him, or that the parties should be subjected to further unnecessary litigation. Defendant did not in his answer admit anything to be due to the plaintiff, but denied the claim in general terms; and as, on his own version of the contract, a certain sum has been found to be due, I think that the Judge was wrong in refusing to decree that sum in his favor."

Morgan, J. said:—"I think the plaintiff should obtain in the present

suit a decree for the balance shown by the books, and that this decree will be in due conformity with the previous allegations and the proofs. The verified plaint required by the Procedure Code does not preclude the Court from framing an issue, and pronouncing a decree respecting any matter *fairly within the scope of the plaint, which the written statements or the oral examinations may show to be a part of the real question in controversy* between the parties. In a suit for one cause of action, a totally unconnected transaction should certainly not be investigated, because the suit is brought to determine not *all* or *any* matters in difference between the parties, but *a certain particular controversy*. There is, perhaps, no substantial difference of opinion as to this rule, but only as to its application to the present case. I cannot regard the balance now ascertained to be due as an unconnected transaction wholly distinct from any cause of action contained in the plaint, and I, therefore, agree with Mr. Justice Campbell that the plaintiff is entitled to recover it in this suit. Our Code does not contemplate that the plaint shall contain several '*counts*,' giving various versions of the contract or title upon which the plaintiff sues, and if we are to hold a plaintiff strictly to the proof of the case alleged in the plaint, and to punish any variance between the contract proved and the contract alleged, by dismissal of the suit, we shall, in my opinion, inflict great hardship on suitors, and sometimes punish them for the errors, and perhaps the unavoidable errors, of their advisers." The following cases, decided under the old Code, Act VIII of 1859, may still be consulted upon the subject of amendment:—*The Delhi and London Bank* v. *Miller*, 7 B. L. R. App. 65 (amendment of plaint by substitution of defendants allowed before written statements were filed by either party): *East India Railway Company* v. *Jordan and others*, 14 W. R. 11 (amendment of plaint by striking out the names of plaintiffs found not to have been partners when the cause of action accrued): *Raihi Mul* v. *Nanack*, 1 N. W. P. Rep. 171 (amendment, but not so as to make a wholly new cause of action): *Joseph* v. *Solano*, 9 B. L. R. 441; S. C. 18 W. R. 424 (plaint amended and an additional issue framed in appeal. Couch, C. J. said:—"I think we have power to do this, and that it might have been done at the hearing, if the plaintiff had applied for it."): *Proby* v. *Bell*, 20 W. R. 6: *Ramdayal Khan, &c.* v. *Ajudhia Ram Khan, &c.*, I. L. R. 2 Calc. 1, 13, 14 (amendment allowed on appeal. Markby, J. after quoting the authorities, said:—"I have no doubt . . . . . that the practice that the Privy Council wish to enforce is not an absolutely rigid adherence to the plaint and written statements (which the Code declares not to be necessary), but that care should be taken to raise properly on the issues, and at the proper time, the questions to be tried, so as to give the parties an opportunity of producing

their evidence, and being heard upon the points upon which the decision of the case ultimately turns"): *Bolye Meah* v. *Khetu Gorai, &c.*, 20 W. R. 208 (here, after the case had been heard, an application was made to raise a fresh question as part of the defence. Couch, C. J. said:—"It was the duty of the Munsif, by the words of the Code of Civil Procedure, at that stage of the suit, if it appeared that the real question between the parties was whether the lease had been granted in such a way as to bind all the shareholders, to have amended the issues so as to determine it. Section 141 says, that, at any time before the decision of the case, the Court may amend the issues or frame additional issues, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made. The Judicial Committee of the Privy Council has said in 6 Moo. Ind. App. page 393, that it is the duty of the subordinate Courts to constantly bear in mind that they are to decide according to equity and good conscience; that the substance and merits of a case are to be kept constantly in view; and that if, by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and (if need be) by adjournment for the decision of the real points in dispute."): and *Súrjamaní Dayí* v. *Sadanand Mahapater*, 20 W. R. 377 (Privy Council were of opinion that a Court had the power, with the consent of the parties, to substitute another form of relief for the relief specially sought).

The Code of Criminal Procedure, Act X of 1872, contains similar provisions. Section 444 is as follows:—"Any accused person may apply to the Court by which he is tried for an amendment of the charge made against him; and, in considering whether any error in a charge did in fact mislead the accused person, the Court shall take into account the fact that he did or did not make such an application."

Prisoner may apply for amendment.

Section 445 empowers any Court, either upon the application of the accused person or upon its own motion, *to amend or alter any charge at any stage of the proceedings* before judgment is signed, or, in cases of trials before a Court of Session, before the verdict of the jury is delivered, or the opinion of the assessors is expressed. Such amendment shall be read and explained to the accused person. Section 447 enacts that, if the amendment or alteration is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused person in his defence, it shall be at the discretion of the Court, after making such amendment or alteration, to proceed with the trial as if the amended charge had been the original charge. Section 448 enacts that, if the amendment or alteration is such that proceeding immediately with the trial is likely, in the opinion of the

Court, to prejudice the accused person in his defence, the Court may either direct a new trial, or suspend the trial for such period as may be necessary to enable the accused person to make his defence to the amended or altered charge; and, after hearing his defence, the Court may further adjourn the trial, to admit of the appearance of any witness whose evidence the Court may consider to be material to the case, or whom the accused person may wish to be summoned in his defence.

Prosecutor and accused person may recall witnesses.

Section 449 provides that, in all cases of amendment or alteration of a charge, the prosecutor and accused person shall be allowed to recall and examine any witness who may have been examined.

Previous sanction to be obtained if offence in new charge require it.

Section 450 further provides that, if the offence stated in the new charge be one for which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained; unless sanction has been already obtained for a prosecution on the same facts as those on which the new charge was based.

Effect of material error.

Finally, Section 451 enacts that, if any Appellate Court, or the High Court in the exercise of its powers of revision, is of opinion that any person, convicted of an offence, was in fact misled in his defence by an error in the charge, it shall direct a new trial to be had upon a charge amended in whatever manner it thinks proper.

In connection with the rule itself there are one or two other points which may be noticed. And first, *surplusage need not be proved.* The term 'surplusage' is used to signify whatever may be struck out of the record without destroying the right of action, or the charge on the one hand or the defence on the other. For example, in an action on a breach of a warranty that some claret was in a fit state to be exported to India, whereas it was at the time, and *the defendant well knew that it was,* in a very unfit state, it was held unnecessary to prove the words in italics, as the cause of action was complete if the claret was really unfit for exportation, whether the defendant was aware of the unfitness or not. *Lord Ellenborough* said:—"If the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is

sufficient to prove that broken to establish the deceit." *Lawrence, J.* said:—"I take the rule to be that, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover."

The next point to be noticed is, that *cumulative allegations, or such as merely operate in aggravation, are immaterial*, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. Where the defendant was charged with composing, printing, and publishing a libel, it was held sufficient to prove *publication*. So on an indictment for *murder*, a prisoner may be convicted of culpable homicide not amounting to murder. On an indictment for killing a sheep with intent to steal the carcass, proof of stealing part of the carcass was held sufficient. In civil actions, where special damage is alleged, it need not be proved, if the words or actions be actionable *per se*. Allegations of *place*, *time*, *number*, and *value* are in general immaterial, unless when *of the essence of the offence*, or necessary to give notice to the accused person of the matter with which he is charged—see Section 440 of the Code of Criminal Procedure.]

PART II.

ON PROOF.

CHAPTER III.—FACTS WHICH NEED NOT BE PROVED.

No evidence required of fact judicially noticed.

56. No fact of which the Court will take judicial notice need be proved.

[As to facts which need not be proved, see also Section 58, *post.*]

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India:

(2.) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:

(3.) Articles of War for Her Majesty's Army or Navy:

(4.) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils' Act, or any other law for the time being relating thereto.

Explanation.—The word 'Parliament,' in clauses (2) and (4), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland;
2. The Parliament of Great Britain;
3. The Parliament of England;
4. The Parliament of Scotland; and
5. The Parliament of Ireland.

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the

time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government:

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette:

(10.) The territories under the dominion of the British Crown:

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakíls, pleaders, and other persons authorized by law to appear or act before it:

(13.) The rule of the road [on land or at sea.][1]

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

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[1] The words in brackets were added by the amending Act, XVIII of 1872.

[(1.) As to what laws or rules have the force of law in India, see *ante*, pp. 4, 5, 97 note; and the *Introduction to the Statute Law of India* prefixed to the Author's *Chronological Table and Index*. The following is a brief account of the legislative powers exercised by the Governments in India:—

3 & 4 Wm. IV Cap. 85, A. D. 1833.

By the 3 and 4 Wm. IV. Cap. 85 Sec. 39, the superintendence, direction, and control of the whole Civil and Military government of the British territories and revenues in India became vested in the Governor-General and Councillors, henceforward styled "*the Governor-General of India in Council.*" Section 40 provided that the said Council should consist of *four* ordinary members, instead of three as formerly; and that, of such four, three should be or have been servants of the East India Company: and that the fourth should be appointed, subject to the approbation of His Majesty, from amongst persons not servants of the Company, and should sit and vote only at meetings held for the purpose of making laws and regulations. Under the 43*rd* section the *Governor-General in Council* was empowered to legislate for all India; and from 1834 the Acts of the "Governor-General of India in Council" were passed for and became law throughout the three Presidencies. Previous to 1834, there were three Legislative bodies, one for each Presidency, *viz.* the Governor-General in Council of the Presidency of Fort William in Bengal for the Bengal Presidency, the Governor in Council of the Presidency of Fort St. George for the Madras Presidency, and the Governor in Council of the Presidency of Bombay for the Bombay Presidency. The Regulations passed by these Legislative Bodies had effect only within their own Presidencies, and formed three separate Codes, dating, respectively, from 1793 in Bengal, from 1802 in Madras, and from 1799 in Bombay. For further information as to details and for the change made in the constitution of the Legislative Council in 1853 by the 16*th* and 17*th* Vic. Cap. 95, the reader is referred to the Author's *Introduction* already mentioned.

The Indian Councils' Act.

In 1861, a change was again made in the constitution of the Council of the Governor-General by the 24 and 25 Vict. Cap. 67, "The *Indian* Councils' Act, 1861," and power was once more given to the Governors in Council of the Madras and Bombay Presidencies to make laws and regulations for the government of these Presidencies. Such laws or regulations are not, however, to have validity until the Governor-General shall have assented thereto, and *such assent shall have been signified to and published by the Governor.* The legislative powers conferred by this Act are thus defined and limited:—

"The Governor of each of the said Presidencies in Council shall have "power at such meetings for the purpose of making laws and regula- "tions as aforesaid, and subject to the provisions herein contained, to "make laws and regulations for the peace and good government of "such Presidency, and for that purpose to repeal and amend any laws "and regulations made prior to the coming into operation of this Act "by *any authority in India*, so far as they affect such Presidency. Pro- "vided always that such Governor in Council shall not have the power "of making any laws and regulations which shall in any way affect any "of the provisions of this Act, or of any other *Act of Parliament in* "*force, or hereafter to be in force, in such Presidency.*

"It shall not be lawful for the Governor in Council of either of the "aforesaid Presidencies, except with the sanction of the Governor- "General previously communicated to him, to make regulations or "take into consideration any law and regulation for any of the pur- "poses next hereinafter mentioned; that is to say—

1. "Affecting the lands of the Crown, or the public debt of India, "or the public revenue derived from assessment of the land, or the cus- "toms duties, or any other tax or duty now in force and imposed by "the authority of the Government of India:

2. "Regulating any of the current coin, or the issue of any bills, "notes, or other paper currency:

3. "Regulating the conveyance of letters by the post-office or "messages by the electric telegraph within the Presidency:

4. "Altering in any way the Penal Code of India, as established by "Act of the Governor-General in Council, No. 42[1] of 1860:

5. "Affecting the religion or religious rites and usages of any class "of Her Majesty's subjects in India:

6. "Affecting the discipline or maintenance of any part of Her "Majesty's Military or Naval Forces:

7. "Regulating patents or copyright:

8. "Affecting the relations of the Government with Foreign Princes "or States."

It was further provided as follows:—

"The Governor-General in Council, so soon as it shall appear to him "expedient, shall, by proclamation, extend the provisions of this Act "touching the making of laws and regulations for the peace and good "government of the Presidencies of Fort Saint George and Bombay

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[1] *Sic*; but evidently a mistake for "45." The Penal Code is Act XLV of 1860.

"(except as hereinafter mentioned) *to the Bengal division of the Presi-*
"*dency of Fort William, and shall specify in such proclamation the*
"*period at which such provision shall take effect,* and the number of
"Councillors whom the Lieutenant-Governor of the said division may
"nominate for his assistance in making laws and regulations; and it
"shall be further lawful for the Governor-General in Council, from time
"to time and in his discretion, by similar proclamation, *to extend the*
"*same provisions to the territories known as the North-Western Provinces*
"*and the Panjáb, respectively.*

"It shall be lawful for the Governor-General, by proclamation, as
"aforesaid, to constitute from time to time new provinces for the pur-
"poses of this Act, to which the like provisions shall be applicable; and,
"further, to appoint from time to time a Lieutenant-Governor to any
"province so constituted as aforesaid, and from time to time to declare
"and limit the extent of the authority of such Lieutenant-Governor, in
"like manner as is provided by the Act of the 17th and 18th years of
"Her Majesty, Chapter 77, respecting the Lieutenant-Governors of
"Bengal and the North-Western Provinces."

The provisions of the Act were extended to the Bengal division of the Presidency of Fort William from the 18th January, 1862, by a proclamation which appeared in the *Calcutta Gazette* of Saturday, January 18th, 1862. They have not as yet been extended to any other province.

The restrictions on the legislative powers of the Governor-General are contained in the following proviso: —

Provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act: or any of the provisions of the Acts of the 3rd and 4th years of King William IV, Chapter 85, and of the 16th and 17th years of Her Majesty, Chapter 95, and of the 17th and 18th years of Her Majesty, Chapter 77, which after the passing of this Act shall remain in force: or any provisions of the Act of the 21st and 22nd years of Her Majesty, Chapter 106, entitled "an Act for the better government of India:" or of the Act of the 22nd and 23rd years of Her Majesty, Chapter 41, to amend the same: or of any Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India: or of the Act for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian Forces, respectively; but subject to the provisions contained in the Act of the 3rd and 4th years of King William IV, Chapter 85, section 73, respecting the Indian Articles of War: *or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof or the authority of Parliament, or the constitution and*

rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominions of the Crown over any part of the said territories.[1]

Many Acts contain a section empowering the Local Government to make rules for carrying into effect the provisions of the Act and declaring that such rules, when made and published in the manner provided, shall have the force of law. These rules fall within the purview of this section. See also section 19, Act III (Bom. C.) of 1857, which makes a special provision for rules made under that Act and relating to Military Cantonments.

Statutes, public, private, local and personal.

(2.) Statutes are either public or private, general or special. The distinction between public and private Acts was first made in the reign of Richard III. A *public* or *general* Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex-officio*, although not formally set forth by a party claiming an advantage under it. But *special* or *private* Acts are rather exceptions than rules, since they only operate upon particular persons and private concerns, and the Courts are not bound to take notice of them, if they are not formally pleaded, unless an express clause is inserted in them that they shall be deemed public Acts and shall be judicially noticed as such without being specially pleaded—which provision is now usually introduced. For convenience of reference, the printed Statute Book of a Parliamentary Session is classified thus:—1. Public General Acts. 2. Local and Personal Acts, declared public and to be judicially noticed. 3. Private Acts, printed by the Queen's printer, and whereof the printed copies may be given in evidence. 4. Private Acts not printed. All Acts of Parliament are to be presumed to be public unless the contrary be declared therein—see 13 and 14 Vict. Cap. 21.

(3.) The Articles of War for Native Officers, Soldiers, and other persons in Her Majesty's Indian Army are contained in Act V of 1869.

Seals.

(6.) The following are some of the Seals of which English Courts take judicial notice, *viz*:—the Great Seal: the Queen's Privy Seal: the Seals of the Superior Courts: the Seals of all Courts constituted by Act of Parliament, if Seals are given them by the Act: of the Registries of the Court of Probate: of the County Courts: of the Corporation of London:

[1] The limitations on the power of the Indian Legislature will be found discussed in *Damodhar Gordhan* v. *Deoram Kanji*, L. R. 3 I. A. 102: and *The Empress* v. *Burah and Bûk Singh*, I. L. R. 3 Calc. 63.

Seals of Foreign States or British Colonies, see 14 and 15 Vict. Cap. 99, Section 7[1]; 18 and 19 Vict. Cap. 42, Section 3; 15 and 16 Vict. Cap. 86, Section 22; 24 and 25 Vict. Cap. 134, Section 202 (Bankruptcy Act); see also *ante*, p. 185, and Tay. §§ 6, 9, 10, 10A, 10B, and 11.

Names, Titles, &c. of Public Officers.

(7.) These provisions, which are far in advance of English law, are in accordance with the rule acted upon in America. In England the signatures of the Superior Equity and Common Law Judges, of the Commissioners and Registrars of the Courts of Bankruptcy, and in certain cases of the officers of the Courts of Chancery and Bankruptcy in all proceedings under the winding-up clauses of the Companies' Act, 1862, are *by Statute* judicially noticed. "On the other hand," says Mr. Taylor, "it appears highly probable that the Courts would not recognize the signatures of the Lords of the Treasury to their official letters; and it is even a matter of some doubt whether the Royal Sign Manual would be judicially noticed." See in connection with this clause, I Ind. Jur. N. S. 106, and *Tamor Sing* v. *Kalidas Rai*, (4 B. L. R. O. J. 51), where judicial notice was taken of a jailor's signature under Section 16 of the Prisoners' Testimony Act, XV of 1869.

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[1] This section enacts that "*all proclamations, treaties, and other acts of State, of any Foreign State, or of any British Colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign State or in any British Colony, and all affidavits, pleadings, and other legal documents*, filed or deposited in any such Court, *may be proved* in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence *either by examined copies or by copies authenticated* as hereinafter mentioned; that is to say, if the document sought to be proved be a *proclamation, treaty, or other act of State*, the authenticated copy, to be admissible in evidence, must purport to be sealed with the Seal of the Foreign State or British Colony to which the original document belongs: and if the document sought to be proved be a *judgment, decree, order, or other judicial proceeding* of any foreign or colonial Court, or any *affidavit, pleading, or other legal document* filed or deposited in any such Court, the authenticated copy, to be admissible in evidence, must purport *either to be sealed with the seal of the foreign and colonial Court* to which the original document belongs, or, in the event of such Court *having no seal*, to be signed by the Judge, or if there be more than one Judge, by any one of the Judges of the said Court, and *such Judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is a Judge has no seal*; but if any of the aforesaid authenticated copies shall purport to be sealed and signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, *without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.*"

(8). Section 431 of the Code of Civil Procedure enacts as follows:—"A foreign State may sue in the Courts of British India, provided that—(*a*) it has been recognized by Her Majesty or the Governor General in Council, and (*b*) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State. The Court *shall take judicial notice* of the fact that a foreign State has not been recognized by Her Majesty or by the Governor General in Council.

Divisions of time, &c.

(9). The Bengalí, Willaití, Faslí, Sambat or Hindí, Hijirí, and Jalús eras will therefore be judicially noticed in those districts in which they are current, and reference may be made to the usual almanacs, when occasion requires.

By Section 25 of the Limitation Act, XV of 1877, all instruments are, for the purposes of that Act, to be deemed to be made with reference to the Gregorian Calendar.

(12). With this may be read Section 7 of The Pleaders', Mukhtars', and Revenue Agents' Act (XX of 1865), which enacts that "the High Court shall cause the name of every person, who shall be admitted a Pleader or a Mukhtar pursuant to the provisions of this Act, to be enrolled in books to be provided and kept for that purpose in such Court. *The Courts shall take judicial notice whether a Pleader or Mukhtar is enrolled or not.*"

"*The Court may resort for its aid to appropriate books*," *&c.*—This is in advance of English law, under which, though an expert, called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority, yet the books themselves cannot be cited. Medical works, for example, and, in a case connected with a horse, works on farriery, have been rejected.[1] As instances of the application of the rule in India, with regard to matters of public history, &c. the following cases may be referred to:—*Issur Ghose* v. *James Hills*, W. R. Special number 84: *James Hills* v. *Issur Ghose*, id. 131 and 148: *Tukuráni Dasi* v. *Bisheshar Mukherji*, 3 W. R. Act X Rul. 29: and the *Dyce Sambre* case, Indian Jurist of 30th April, 1867. In these cases Mill's History of India, Mill's Political Economy, McCulloch's Political Economy, Wilson's History of England, Sanads, Treaties, and other similar works and documents were freely quoted by the Bench and the Bar. In the case of *The Collector of Madura* v. *Mútú Ramalinga Sathupathi* (12 Moo. Ind. Ap. 398), sworn translations of Sanscrit works, little known, embodying

[1] *Darby* v. *Ousley*, 20 Jurist 497.

Hindu law, as to the custom in the different schools with respect to the law of adoption, were admitted both in India and England.

The last clause of the section is in accordance with *Von Omeron* v. *Dowich*, in which Lord Ellenborough declined to take judicial notice of the King's proclamation, the counsel not being prepared with a copy of the Gazette in which it had been published.[1] In *Reg.* v. *Withers* it became a material question to consider how far the prisoner owed obedience to his sergeant, and this depended on the Articles of War, which were not produced at the trial. The Judges were of opinion that they ought to have been produced.[2] It will be observed that though the Court *may* refuse, it is not imperative that it should refuse. The Gazettes are usually supplied to, filed, bound, and preserved in the office of all Courts in India; and, when any matter may be placed beyond doubt by the mere production of the *Gazette*, the Court might properly have it produced from its own record-room. Pleaders should, however, make a request to this effect in sufficient time to prevent delay at the hearing.]

Facts admitted.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

[As to admissions, more especially in Civil proceedings, see *ante*, pp. 136, 141.

Section 128 of the Code of Civil Procedure (corresponding with Section 117 of the Common Law Procedure Act, 1852, 15 and 16 Vict. Cap. 76, and with Order 32, Rule 2 of the present Rules of Court under the Supreme Court of Judicature Act), enacts as follows:—"Either party may, by a notice through the Court, within a reasonable time *not less than ten days before the hearing*, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the suit. The

[1] 2 Campbell's Rep. 44. [2] See *R.* v. *Holt*, 5 Term. Rep. 446.

admission shall also be made in writing signed by the other party or his pleader, and filed in Court. If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders. If such notice is not complied with *within four days* after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the suit."

In the case of *Bibi Takai Sherob* v. *Beglar* (6 Moo. Ind. Ap. 521) the Lords of the Privy Council made the following observations:—"It is said on the part of the appellant, that that will was not properly in evidence, for although a will was produced (or rather an official copy of a will was produced) there was no examination of witnesses, and though that will had been proved by *Gobind* as to the personal estate, that would be no evidence against the appellant; at all events it would not affect the real estate. If it would be necessary to decide that question, their Lordships would be inclined to hold that the will was sufficiently in evidence for the purposes of this suit. The Regulation[1] provides that, where documents are produced, and they are not disputed, they shall be received without proof." In *Nand Kishor Das Mahant* v. *Ram Kalp Rai* (6 B. L. R. App. 49) these observations were referred to as substantially laying down that the rules which regulate the conduct of cases in the Mufassil Courts do not necessitate the proving of documents which are not disputed. It would appear, however, that their Lordships spoke with especial reference to the state of things antecedent to the operation of the Code of Civil Procedure. Certainly it would be difficult to reconcile any such general rule with other observations which are to be found in more recent judgments, and which strongly impress the necessity of parties proving by competent evidence the case which they must prove in order to succeed—see *ante*, p. 140. Under the existing procedure, there can be no doubt that documents, if not expressly admitted, must be proved. (See Section 67, *post.*)

As to admissions by Vakils, see *ante*, page 28, *note*.]

CHAPTER IV.—OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

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[1] What Regulation is here referred to, there is nothing in the report to show: but it may be observed that all the old Regulations relating to civil procedure have been repealed by Act X of 1861 and subsequent repealing Acts.

[For instance, the adjustment of an account may be proved by oral evidence (*Purnima Chaudrain and others* v. *Nityanand Saha and others*, B. L. R. Sup. Vol. F. B. 3); and the payment of money may be similarly proved, even though there be a writen receipt not produced (*Dalip Singh* v. *Durgu Prosad*, I. L. R. 1 All. 442; Illustration (*e*) Section 91, *post*). Where there is a conflict of oral evidence, the Privy Council have more than once remarked upon the value of documentary evidence as a guide to show on which side the truth lies (*Mussamat Imam Bandi* v. *Hargobind Ghose*, 4 Moo. Ind. Ap. 403: *Ekauri Singh* v. *Hiralal Seal*, 2 B. L. R. P. C. 8). It may also be observed that when testimony is conflicting, much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented (*Mir Asadúla* v. *Mussamat Bibi Imaman*, 1 Moo. Ind. Ap 43.]

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct;

That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called

as a witness without an amount of delay or expense which the Court regards as unreasonable;

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

[See *ante*, pp. 146—147.

The first *proviso* which should be read with Sections 45 and 46, *ante*, is an alteration of the rule of English law, which does not admit this evidence. The treatise, in order to be admissible, must be one *commonly offered for sale*. The burden of proving that any particular treatise is commonly offered for sale will be upon the person who desires to give such treatise in evidence (see Section 104, *post*).

With reference to the second *proviso*, see the remarks at page 80, *ante*.]

CHAPTER V.—OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document:

[These are usually known as *duplicate*, *triplicate*, *originals*.]

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

[And secondary evidence as against the other parties. See clause 4, section 63, *post*, and Tay. § 396.]

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

[*R.* v. *Watson*, 32 Howell's State Trials, 82—86.]

Secondary evidence.

63. Secondary evidence means and includes—

(1.) Certified copies given under the provisions hereinafter contained;

[See section 76, *post*.]

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

[Such, for example, as the processes mentioned in Explanation 2, section 62. Read Illustration (*c*) with the latter portion of this clause.]

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents as against the parties who did not execute them;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a*.) A photograph of an original is secondary evidence

of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b.*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it be shown that the copy made by the copying machine was made from the original.

(*c.*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence: but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d.*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

[Reading together Clause 2 and Illustrations (*b*) and (*c*), it will appear that a *copy of a copy*, *i. e.* a copy transcribed from and compared with a copy, is inadmissible, unless the copy with which it was compared were a copy made by some mechanical process which in itself insures the accuracy of such copy. The effect of this is that the following cases are no longer law so far as they relate to copies :—*Unida Rajaha Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidú*, 7 Moo. Ind. Ap. 128: *Ajúdhia Persad Singh* v. *Amrao Singh*, 6 B. L. R. 509: *Tayabanissa Bibí* v. *Kuwar Sham Kishore Rai*, 7 B. L. R. 627: *Makbul Ali* v. *Srimatí Masnad Bibí and others*, 3 B. L. R. Civ. Rul. 54: *Ram Gopal Rai, &c.* v. *Gordon, Stuart and Co.*, 14 Moo. Ind. Ap. 453.

The correctness of certified copies will be presumed under section 79, *post;* but that of other copies will have to be proved. This proof may be afforded by calling a witness, who can swear that he has compared the copy tendered in evidence with the original, or with what some other person read as the contents of the original, and that such copy is correct. It is not necessary for the persons examining to exchange papers and read them alternately both ways.[1] It may seem scarcely necessary to remark that proof of a copy being a *correct copy* is no proof of the *original*, *i. e.* of its execution, genuineness, &c. (*Ram Jadú Gangúlí* v. *Lakhi Narain Mandal*, 5 R. C. & C. R. Act X Rul. 23. See also *Amiranissa Khatún, &c.* v. *Abedanissa Khatún, &c.*, 23 W. R. 208).]

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[1] Tay. § 1389.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Proof of documents by primary evidence.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :—

Cases in which secondary evidence relating to documents may be given.

(*a.*) When the original is shown or appears to be in the possession or power

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section sixty-six, such person does not produce it ;

[Any secondary evidence is here admissible, see below.]

(*b.*) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

[The written admission is the secondary evidence here admissible, see below. As to oral admissions of the contents of a document, see *ante*, section 22.]

(*c.*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

[Any secondary evidence is here admissible, see below. When a *registered* deed of sale had been lost, it was held, therefore, that oral evidence of the transaction might be received, and that it was not necessary to insist upon the production of a certified copy from the Registration Office (*Harish Chandra Mullick* v. *Prosonno Kumar*

§65(c) - The original being lost & there being no provision for receiving penalty & addl. stamp on lost instruments, secondary evidence not admissible - Marine Investment Co. v. Haviside. L.R. 5 H.L. 624 followed in I.L.R. 7 Mad 441 - Kopasan v. Shamu.

Banneryi, &c., 22 W. R. 303). As to the value of a latbandí as secondary evidence of a certificate of sale, see *Asturam* v. *Mohan Lal*, 21 W. R. 333.]

(*d.*) When the original is of such a nature as not to be easily movable ;

[Any secondary evidence is here admissible, see below.]

(*e.*) When the original is a public document within the meaning of section seventy-four ;

[A *certified copy* is the only evidence here admissible, see below.]

(*f.*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

[A certified copy is the only evidence here admissible, see below.]

(*g.*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

[See the last clause of the section, and *ante*, page 197.]

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

[(*c.*) The person desiring to give the secondary evidence must show that the original has been destroyed or lost, &c. see section 104, *post*, and Illustration (*b*) thereto. Proof of loss may be given by evidence that the document once existed, and that search was made for it to no purpose in the place or places where it would most likely be found. This search need not necessarily have been recent or made for the

purposes of the suit. The Lords of the Judicial Committee of the Privy Council very early applied to Indian cases the rule that copies are inadmissible without proof of search for the originals—see *Mír Asadúla* v. *Bíbí Imaman*, 1 Moo. Ind. Ap. 41: *Syud Abbas Ali Khan* v. *Yadún Raní Reddy*, 3 Moo. Ind. Ap. 156. In the latter case a bond was said to have been torn, and the alleged fragments were produced, but there was no evidence that they were really the fragments of the bond in question. See also *Sûkram Sûkal and others* v. *Ramlal Sûkal*, 9 W. R. Civ. Rul. 248: *Rûpmanjûri Chaudhraní and Jugat Chandra Sirkar* v. *Ram Lal Sirkar and others*, 1 W. R. Civ. Rul. 145: *Mafizudín Kází* v. *Meher Alí and others*, 1 W. R. Civ. Rul. 212: and *Eshan Chandra Chaudhrí* v. *Beirab Chandra Chaudhrí*, 5 W. R. Civ. Rul. 21. There is one case in which oral evidence cannot be admitted of a writing destroyed or lost, and which therefore forms an exception to the general rule contained in this clause, *viz.* when the writing is an acknowledgment which would have the effect of extending the period of limitation under section 19 of the Indian Limitation Act, XV of 1877.

(*d.*) As, for example, in the case of inscriptions on walls, tombstones, monuments (see *ante*, pp. 144,171), surveyors' marks on boundary trees, and where an alleged libel had been written on the wall of the Liverpool gaol.

(*f.*) See sections 76—78, *post*.

(*g.*) See also section 394 of the Code of Civil Procedure, *ante*, p. 198.

With reference to the last four paragraphs, which provide what kind of secondary evidence is to be given in each case, it may be observed that there is no provision for cases in which two causes for non-production of the original are combined. For example, if the original be a record of a Court of Justice (*e*); and if it also have been lost or destroyed (*c*). Such a case has more than once occurred in India. In *Babú Gúrú Dyal Sing* v. *Darbarí Lal Tewarí* (7 W. R. Civ. Rul. 18) the record was lost in transit from the Court of first instance to the Appellate Court, and the Calcutta High Court directed the admission of secondary evidence of the papers which made up the entire record. See also *Banwari Lal* v. *J. Furlong*, 8 W. R. Civ. Rul. 38: *Raní Emamun* v. *Hardyal Singh*, W. R. Jan.—July, 1864, p. 301 (decree destroyed during the mutiny): and *Ranjít* v. *Chuní Lal*, 1 N. W. P. Rep. 78.

This section is applicable to both civil and *criminal* cases, and is a relaxation of the rule of English law, which requires stricter proof in criminal than in civil proceedings, and under which it was decided that in the former the *original* registers of births, deaths, marriages, &c. must be produced, and that *copies* will not be sufficient.]

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is [or to his attorney, or pleader[1]], such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Rules as to notice to produce.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1.) When the document to be proved is itself a notice;

(2.) When from the nature of the case, the adverse party must know that he will be required to produce it;

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4.) When the adverse party or his agent has the original in Court;

(5.) When the adverse party or his agent has admitted the loss of the document;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

[According to English practice a *notice to produce* is used for an

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[1] The words in brackets were added by the amending Act, XVIII of 1872.

adversary in the cause; while a stranger legally compellable to produce a document is served with a *subpœna duces tecum*. It would appear from clause (*a*) of section 65 that the notice to produce referred to in sections 65 and 66 is a notice served either on an adversary or on a stranger. The following sections of the Code of Civil Procedure may be read in connection with the subject:—

Summons to order defendant to produce documents required by plaintiff or relied on by defendant.

70. The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

Notice to produce for inspection documents referred to in plaint, &c.

131. Every party to a suit may at any time before or at the hearing thereof give notice through the Court to any other party in whose plaint, written statement or affidavits reference is made to any document, to produce such document in the presence of such officer as the Court appoints in this behalf, for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

Consequence of non-compliance with such notice.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

Party receiving such notice to deliver notice when and where inspection may be had.

132. The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time within three days from such delivery at which the documents, or such of them as he does not object to produce, may be inspected at his pleader's office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

Application for order of inspection.

133. If any party served with notice under section 131 omits to give notice under section 132 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

Application to be founded on affidavit.

134. Except in the case of documents referred to in the plaint, written statement, or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such

application shall be founded upon an affidavit showing (*a*) of what documents inspection is sought, (*b*) that the party applying is entitled to inspect them, and (*c*) that they are in the possession or power of the party against whom the application is made.

Time, place, and purpose of attendance to be specified in summons.

163. Every summons for the attendance of a person to give evidence or produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Summons to produce document.

164. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

See also sections 162, 163, and 164 of the Evidence Act, *post.*

Persons omitting to produce documents after service of notice, may be proceeded against criminally under section 175 of the Indian Penal Code.[1]]

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

[As to the method of proof, see section 47, *ante*, and section 73, *post.* It is very commonly the practice with Munsifs and other Subordinate Judicial Officers, when taking the evidence required by this section, to record merely that the witness verified (*tasdik hiya* or some similar expression) the document without stating the exact nature of the evidence offered or the statement made by the witness. In *Ganga Persad, &c.* v. *Inderjit Singh, &c.* (23 W. R. 391) the Lords of the Privy Council

[1] In section 65, "existence, condition, or contents" are spoken of. In section 66, "contents" only occurs. Can secondary evidence of existence or condition be given in any case without notice?

said:—"The documentary evidence on which the defendant's case principally rested consisted of two *amanatnamas* and the endorsements of payments thereon, which purported to have been signed by the plaintiffs; because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs; and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were identified and verified, as the Judge says, by the witnesses; the witnesses would have been called upon to state whether they saw B. S. sign the first, or B. S. and A. sign the second; or, if not, whether they could speak to the handwriting; and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted." If the parties are not represented by pleaders, who understand their duty sufficiently to question the witnesses upon these essential details, the Judge should undoubtedly supply the omission—see *ante*, page 37, note. In *Nilkant Pandit, &c.* v. *Jagabandhu Ghose, &c.* (12 B. L. R. App. 18) it was contended that the above section renders it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. Markby, J. observed that this is not expressly stated in the section, and that it did not appear to him that such was the intention of the Legislature: that the section merely states with reference to deeds what is the universal rule in all cases, that the person who makes an allegation must prove it, but lays down no new rule as to the kind of proof which must be given.]

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United

Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

[The admission here spoken of, which relates to the *execution*, must be distinguished from the admission mentioned in section 22, *ante*, page 116, and that mentioned in clause (*b*), section 65, *ante*, which relate to the contents, &c.]

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Strictness of English law.

["The general rule," says Mr. Taylor, "which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled or a burnt deed; as also to one the execution of which is admitted by the party to it; and that, too, though such admission be deliberately made either in open Court, or in a subsequent agreement, or even in a sworn answer to a bill of discovery filed against the person in the cause. Nay, a party in a cause, who is called as a witness by his opponent, cannot be required or even permitted to prove the execution by himself of any instrument to the validity of which attestation is requisite, so long as the attesting witness is capable of being called. So, also, the attesting witness must be called, though, subsequently to the execution of the deed, he has become blind; and the Court will not dispense with his presence on account of illness, however severe. If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him on interrogatories; and if he be taken suddenly ill, a motion must be made to postpone the trial."[1] These strict rules continued

[1] § 1461.

to be applied not only to documents *required by law* to be attested, but also to documents which, when produced, appeared to be signed by *subscribing witnesses*, until the passing of the Common Law Procedure Act, 1864 (see note to section 72, *post*). The above four sections of the Indian Act are applicable only to documents *required by law to be attested*, and they further contain a reasonable relaxation of that strictness which has been found in practice detrimental to justice.

Reasonably relaxed by the Indian Act.

Their provisions may thus be summarized:—(1) When there is an attesting witness alive, subject to the process of the Court and capable of giving evidence, he *must* be called. (2) When there is no attesting witness alive, subject to the process of the Court and capable of giving evidence, it must be proved by other evidence—(see section 47, *ante*, and section 73, *post*),—(*a*) that the attestation of one attesting witness at least is in his handwriting; and (*b*) that the signature of the person executing the document is in the handwriting of such person. The admission of a party to the document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness or of giving any other evidence. If one of two or more attesting witnesses being called denies or does not recollect the execution of the document, it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced.

The Evidence Act contains no definition of what is a "signature." Section 69 seems to imply that the attestation of the attesting witness must be in his own handwriting, which implication assumes that the witness knows how to write. As a matter of fact, however, the greater number of attesting witnesses in India are marksmen. The definition of "signature" contained in section 3 of the Registration Act, III of 1877, includes and applies to the affixing of a mark. See also section 50 of the Indian Succession Act, X of 1865, which speaks of the testator "signing or affixing his mark." It has been decided under several Statutes in England that a signature by affixing a mark is a good signature.

Signature.

There are few documents which are required by law to be attested in India and out of the Presidency Towns. Wills made after the first day of January, 1866, by persons other than Hindus, Muhammadans, or Budhists; and wills made by Hindus, Jainas, Sikhs, and Budhists on or after the first day of September, 1870 in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay, or relating to immovable property situate within those limits, must be attested (see sections 50 and 331 of Act X of 1865; and Act XXI of 1870).

It does not very clearly appear from the above sections whether the attesting witness, when producible, must be called, if the document itself is not forthcoming, and is, therefore, not *used as evidence* (section 68); but secondary evidence is given of its contents under the provision of sections 65 and 66, *ante*. According to English law, when an instrument is proved to be in the possession of the adverse party, who refuses to produce it after notice, other evidence may be given without calling the attesting witness.

When the document is *thirty years old*, it is not necessary to call the attesting witnesses, see section 90, *post*.]

72. An attested document not required by law to be attested may be proved as if it was unattested.

Proof of document not required by law to be attested.

[This section corresponds with section 37 of the repealed Act, II of 1855, and with section 26 of the Common Law Procedure Act, 1854, which latter is as follows:—"It shall not be necessary to prove by the attesting witness any instrument *to the validity of which attestation is not requisite*; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." The words in italics apply to two classes of cases, *viz*:—1*st*, when the parties themselves, or those under whom they claim or act, have expressly directed that the instrument be attested by one or more witnesses; 2*nd*, when attestation is required by some Act or Statute.

The use of the phrase "*required by law*" would appear to show that the section of the Indian Act is intended to apply to the latter class of cases only.]

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

Comparison of hand-writings.

The Court may direct any person present in Court to write any words or figures for the purpose of

enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

["English law, until recently," says Mr. Taylor, "did not allow the witness or even the jury, except under certain special circumstances, actually to compare two writings with each other in order to ascertain whether both were written by the same person. This technical rule of the Common Law—which was certainly *not* based on common sense, and which was directly opposed to the practice of our own Ecclesiastical Courts, of the French Courts, and of the Courts of many of the most enlightened States in America—has happily, for the administration of justice, been at length abrogated by the Legislature, at least as far as relates to *civil* proceedings. Section 27 of the Common Law Procedure Act, 1854, enacts that, 'comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute'" (§ 1657). This section applies to *civil* cases only. The section of the Indian Act applies to all cases, civil and criminal. The comparison may be made by witnesses (see section 47, *ante*) or by the Court. The new section differs somewhat from the corresponding section (48) of the repealed Act, II of 1855, *viz.*: "On an enquiry whether a signature, writing, or seal is genuine, any *undisputed* signature, writing, or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one, though such signature, writing, or seal be on an instrument, which is not evidence in the cause." The following cases decided under the old section may be referred to:—*Puran Chandra Chatterji* v. *Grish Chandra Chatterji*, 9 W. R. Civ. Rul. 450: *Rajendra Nath Haldar* v. *Jagendra Nath Haldar and others*, 7 B. L. R. 216 (opinion of a Native Judge on a question of native handwriting preferred by the Judicial Committee to that of the English Judges of the High Court); and see *Phudi Bibi* v. *Gobind Chundra Rai* (22 W. R. 272), where a munsif's view was accepted in preference to that of a Subordinate Judge, the latter having clearly made the comparison in some way which led to error: *Kurali Persad Misser* v. *Anantaram Hajra and others*, 8 B. L. R. 490, (finding of forgery on comparison of handwriting only disapproved): and *The Queen* v. *Kartick Chandra Haldar and another*, 5 R. C. and C. R. Crim. Rul. 58. Can a witness, called to prove handwriting, be tested in cross-examination by showing him other documents and asking him whether they are in the same handwriting as that in dispute, and then

if he reply in the affirmative, proving that they are not so? Mr. Taylor is in favour of such a practice. There does not seem to be anything in the Indian Evidence Act opposed to its adoption.]

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents:—

1. Documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial, and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

[In *Prithi Singh, &c.* v. *The Court of Wards on behalf of Sheo Sundari* (23 W. R. 272) letters which passed between the district authorities were admitted to show that a certain person mentioned therein was alive at the time they were written.]

2. Public records kept in British India of private documents.

[Under these provisions, for example, certified copies of *wills* are admissible, the original wills being retained by the Courts after grant of probate or letters of administration. As to *registered documents*, see section 57 of Act III of 1877, *post*.]

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such

document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Who are entitled to certified copies?

[Whether or not a person will be *entitled to a copy of a public document* will therefore depend upon whether or not he has *a right to inspect it.* The question whether a person has a right to inspect any particular document or documents will in some cases be somewhat difficult to answer. There is no general provision on the subject to be found in any enactment in force in British India, although there are some special provisions applicable to particular cases, which will be noticed presently. Mr. Taylor, speaking of the Statute[1] which placed under the charge and superintendence of the Master of the Rolls the records of the Executive, Legislative, and Judicial Departments of the British Government, observes that it contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them. He further observes that, although at the present day the question, whether the public have a strict legal right to inspect these records, is not likely to be mooted,[2] it would be difficult to establish the right, except as to such of the documents as are the records of the superior Courts of law or equity; and even with respect to these it may be doubtful whether the Queen's Bench would interfere by *mandamus*, unless the applicant was prepared to show that he was interested in the document which he sought to inspect. Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the Court or of the chief executive Magistrate, or of the head of the depart-

[1] 1 & 2 Vict. Cap. 94.

[2] Rules having been made, under which free access is afforded to all persons having occasion to inspect them.

ment under whose control they may be kept, be *injurious to the public interests*, an inspection would not be granted.[1]

Acts entitling to copies or to inspection.

Under the provisions of the Indian Registration Act. III of 1877, five Registers are kept, *viz.* Nos. 1, 2, 3, and 4, in all Registration offices; and No. 5 in the offices of Registrars.

I. In Book No. 1 are entered or filed all documents or memoranda which have been registered and which relate to *immovable property* and are not wills, whether the registration of such documents or memoranda be compulsory or optional. II. In Book No. 2 are recorded the reasons for refusals to register. III. Book No. 3 is the Register of Wills and authorities to adopt. IV. Book No. 4 is a Miscellaneous Register in which are entered all instruments (other than those relating to immovable property), the registration of which is optional. V. Book No. 5 is the Register of Deposits of Wills deposited with Registrars in sealed covers.[2] Books Nos. 1 and 2, and the Indexes to Book No. 1, are at all times open to inspection by any person applying to inspect the same: and copies of entries in these books must be given to *all persons* applying therefor. Copies of the entries in Book No. 3 and in the Index relating thereto must be given to the persons executing documents to which such entries relate or to their agents, and after the death of the executants (but not before) to any person applying for such copies. Copies of entries in Book No. 4 and in the Index relating thereto must be given to any person executing or claiming under the documents to which such entries respectively refer or to his agent or representative. The requisite search for entries in Books Nos. 3 and 4 can be made only by the registering officer. All such copies are to be signed and sealed, and they are *admissible for the purpose of proving the contents of the original documents*.[3]—Persons are entitled to search Marriage Registers kept under Act XV of 1872 and to obtain copies thereof.[4] Declaration of the keepers of printing presses and of the printers and publishers of periodicals are open to inspection, and copies of them must be given on payment of the proper fee.[5] The Register of Copyright in books published in India, kept in the office of the Secretary to the Government of India, is open to inspection, and copies of the entries therein are to be given to persons

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[1] Taylor, § 1336.

[2] See sections 17, 18, 42, and 51 of the Registration Act.

[3] See section 57 of the Registration Act.

[4] See sections 79 and 80 of the Act.

[5] See section 6, Act XXV of 1867.

applying for them.[1] Every person is entitled to inspect the Registers and documents kept by the Registrar of Joint Stock Companies and to obtain copies.[2] Under the provisions of section 43 of Act II of 1874, the books kept by the Administrator-General are open to the inspection of all persons during office hours and upon payment of a reasonable fee. None of the Acts to which reference has just been made contains any particular remedy to which resort may be had if inspection or copies be refused: but an order directing the public officer concerned to do his duty in the matter may now be obtained from the High Court under the provisions of Chapter VIII of "The Specific Relief Act," I of 1877. In England the remedy is by application to the Court of Queen's Bench for a *mandamus*.

Records of Civil Courts.

Under the provisions of the Code of Civil Procedure (sections 217 and 580) certified copies of the judgment and decree of first instance and on appeal must be furnished to the parties on their application and at their expense. There is no express provision of the Legislature entitling parties or others to copies of any other portions of the records of the Civil Courts; but, as a matter of practice, copies are usually given to any of the *parties* who may apply for them. The Calcutta High Court have made the following rules on the subject:—(1) A plaintiff, or a defendant, who has appeared to the suit, is entitled at any stage of the suit to obtain copies of the record of the suit, including exhibits, which have been put in and finally accepted by the Court as evidence. A party, who has been ordered to file a written statement, is not entitled to inspect or take a copy of a written statement filed by another party until he has filed his own. (2) A stranger to the suit may after decree obtain, as of course, copies of the plaint, written statements, affidavits, and petitions filed in the suit; and may, for sufficient reason shown to the satisfaction of the Court, obtain copies of any such documents before decree. (3) A stranger to the suit may also obtain, as of course, copies of judgments, decrees or orders at any time after they have been passed or made. (4) A stranger to the suit has no right to obtain copies of exhibits put in evidence, except with the consent of the person by whom they were produced—(Cir. Order No. 67, June 2, 1875).

Records of Criminal Court.

In criminal cases an accused person committed under the Code of Criminal Procedure to the High Court or to the Court of Session, is entitled to a copy of the charge free of all expense;[3] and, if he

[1] See section 3, Act XX of 1847.

[2] See clause 5, section 190 of Act X of 1866. For other public Registers in India, see *ante*, pp. 200-201.

[3] See also section 90 of the Presidency Magistrates' Act, IV of 1877.

apply within a reasonable time, to copies of the depositions; these latter copies to be made at his expense, unless the Magistrate see fit to give them free of cost (see sections 199 and 201).

Under the provisions of section 464 (as amended by Act XI of 1874) "the judgment or order shall be explained to the accused person or persons affected by it, and on his application a copy thereof shall be given to him without delay free of cost and in his own language, if practicable; if not, in the language of the Court." Section 276 (as amended by the same Act) enacts that "if any person affected by a sentence or other order passed by a Criminal Court desires to have a copy of the Judge's *charge to the Jury or of any other proceeding not being the judgment or order* provided for by section four hundred and sixty-four, he shall, on applying for such copy, be furnished therewith, provided that he pay for the same, unless the Court, for some special reason, sees fit to furnish it free of cost." See also the provisions of section 170 of the Presidency Magistrates' Act, IV of 1877.

A person in confinement under a final sentence or order passed by a Criminal Court, and desirous of appealing against the same, is entitled to a copy thereof as well as of the judgment or reasons for passing it on *unstamped* paper.[1] The new Code of Criminal Procedure, like the former Code, contains no provisions entitling parties to copies of any other papers than those just mentioned, *e. g.* to copies of depositions in summons or warrant cases tried by Magistrates or in cases tried by the Court of Session. Under the former Code the Madras High Court refused to direct a Sessions Judge to furnish a person convicted with copies of the notes of the evidence and proceedings in the case (*The Queen* v. *Sabbaya Gaundan*, 1 Mad. Rep. 138). In a case which came before the Calcutta High Court, it was held that a Magistrate had wrongly refused to a prisoner under trial before him copies of certain papers which he required for his defence. In three at least of the four papers with which this case was concerned, the prisoner had an interest, although none of them fell within the express provisions of the law (*In the matter of the petition of Sib Persad Panda*, 6 B. L. R. App. 59).

It is to be noted that the certificate is to be written *at the foot* of the copy, and not at the top, as has hitherto been the practice, in Bengal at least.

For the presumption that is to be made as to the genuiness of certified copies, see section 79, *post*.]

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[1] Notification of Government of India, Separate Revenue, No. 2520, dated 5th April, 1872.

Production of such copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

[It may be well to observe that the contents of public documents only can be proved by certified copies. The contents of private documents, such as *kobalas*, conveyances, leases and the like filed in a Court or public office for purposes of evidence in a suit, are not so provable in another suit (*Harihar Mazimdar, &c.* v. *Charan Manjhi, &c.*, 22 W. R. 355). As to written statements, see *Shazada Mahomed Shahabudin* v. *Wedgeberry*, 10 B. L. R. App. 31.]

Proof of other official documents.

78. The following public documents may be proved as follows :—

(1.) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government :

(2.) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3.) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4.) The Acts of the Executive or the proceedings of the Legislature of a foreign country,

by journals published by their authority, or com-

monly received in that country as such, or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council:

(5.) The proceedings of a municipal body in British India,

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6.) Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

[In connection with this section should be read *The Documentary Evidence Act*, 1868, 31 Vict. Cap. 37, the portions of which concerned with evidence are as follow:—

The Documentary Evidence Act, 1868.

2. *Prima facie* evidence of any Proclamation, Order, or Regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any Proclamation, Order, or Regulation issued before or after the passing of this Act by or under the authority of any such Department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all Courts of Justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(*a.*) By the production of a copy of the *Gazette* purporting to contain such Proclamation, Order, or Regulation.

(*b.*) By the production of a copy of such Proclamation, Order, or Regulation purporting to be printed by the Government Printer, or, where the question arises in a Court in any British Colony or Possession, of a copy purporting to be printed under the authority of the Legislature of such British Colony or Possession.

(c.) By the production, in the case of any Proclamation, Order, or Regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any Proclamation, Order, or Regulation issued by or under the authority of any of the said Departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such Department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any Proclamation, Order, or Regulation.

3. Subject to any law that may be from time to time made by the Legislature of any British Colony or Possession, this Act shall be in force in every such Colony and Possession.

Interpretation Clause.

5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction (that is to say) —

"British Colony and Possession" shall, for the purposes of this Act, include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for *the government of India* and all other Her Majesty's dominions.

"Legislature" shall signify any authority other than the Imperial Parliament of Her Majesty in Council competent to make laws for any Colony or Possession.

"Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto.

"Government Printer" shall mean and include the Printer to Her Majesty and any printer purporting to be the printer authorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the Legislature of any British Colony or Possession, or otherwise to be the Government Printer of such Colony or Possession.

"Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes.

6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing Statute or existing at Common Law.

SCHEDULE.

COLUMN 1.	COLUMN 2.
NAME OF DEPARTMENT OR OFFICER.	NAMES OF CERTIFYING OFFICERS.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.

As to the proof in England and Ireland of proclamations, treaties and other Acts of State of Foreign States or of British Colonies, and of judgments, decrees, orders and other judicial proceedings of Courts in such States or Colonies, see the 14 & 15 Vict. Cap. 99 (Lord Brougham's Act), section 7, *ante*, note to section 57; and in connection therewith section 82, *post*.

Naturalization Act, 1870.

Section 12 of *The Naturalization Act*, 1870, 33 Vict. Cap. 14, contains the following regulations as to evidence of the declarations, certificates, &c. authorized by the Act:—

The following regulations shall be made with respect to evidence under this Act:—

(1.) Any declaration authorized to be made under this Act may be

proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned:

(2.) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(3.) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(4.) Entries in any register authorized to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of Her Majesty's Principal Secretaries of State, and the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register:

(5.) The Documentary Evidence Act, 1868, shall apply to any regulation made by a Secretary of State, in pursuance of, or for the purpose of carrying into effect, any of the provisions of this Act.

See also section 10 of the Extradition Act, XI of 1872, *ante*, p. 184. See as to proof by recitals in Statutes, Acts, &c. section 37, *ante*, page 208. See as to the presumption to be made with respect to seals, signatures, and official character, section 82, *post*.]

Presumptions as to Documents.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and

which purports to be duly certified by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

[This section applies only to certificates, certified copies, or other documents certified by *officers in British India or by duly authorized officers in allied Native States.* The presumption that the document itself is genuine, of course, includes the presumption that the *signature* and the *seal* (where a seal is used, see section 76, *ante*) are genuine. The last clause of the section provides for presumption as to *official character*. For similar presumptions as to similar documents certified by officers other than those above specially designated, see section 82, *post.*

Having advertence to the definition of "shall presume" (*ante*, page 81), it will be open to the other side to give evidence to show that the certificate, certified copy, or other document is not genuine, or that the officer by whom such document purports to be signed or certified does not hold the official character which he claims in such paper.

For an example of certificates, see section 60 of the Registration Act, III of 1877, and sections 326, 427, and 432 of the Code of Criminal Procedure, Act X of 1872.]

Presumption on production of record of evidence.

80. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or

Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

[If, on a trial for intentionally giving false evidence, a document were produced for the prosecution which purported to be a record of the evidence given by the prisoner, and which was charged to be false, could the Court presume therefrom that the prisoner had, when deposing as a witness, used the very words which appeared in such record, or their vernacular equivalent? See the cases of *The Queen* v. *Ganauri*, 22 W. R. Cr. Rul. 2; and *The Queen* v. *Mangal Das*, 23 W. R. Cr. Rul. 28. With reference to the last of these cases it may be observed that, in Bengal, evidence is recorded not under section 334, but under section 335 of the Code of Criminal Procedure. It would therefore appear that section 339 had no application. The Crown was not represented at the hearing of the appeal, and the point does not appear to have been considered. The words "*that such evidence.....was duly taken*," would, perhaps, warrant the presumption that the accused had spoken the words found in the record or their vernacular equivalent, in which case the section alters the law as laid down in *The Queen* v. *Fatik Bishwas*, 1 B. L. R. Cr. Rul. 16. It is to be observed, however, that it would be open to the defence to show that the language used by the prisoner had not been accurately recorded, see the definition of "shall presume," *ante*, page 81. In the case of *Behari Lall Bose and others* (9 W. R. Cr. Rul. 69) it was held that the failure of a Collector to make an English memorandum of the evidence as required by law could not prevent the depositions recorded at full length in the vernacular from being used against a prisoner on his trial for intentionally giving false evidence.]

Presumption as to Gazettes.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency, or possession of the British Crown, or to be a

newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

[See section 37, *ante*, and section 90, *post;* and as to *private Acts*, see *ante*, page 386.]

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced to any Court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

[For some documents which would be admissible in Courts of Justice in England or Ireland without proof of seal, signature, or official character, see 33 & 34 Vict., Cap. 52, *ante*, page 185; section 2 of the Documentary Evidence Act, 1868, *ante*, page 387; and 14 & 15 Vict. Cap. 99, section 7, *ante*, note to section 57.

8 & 9 Vict. Cap. 113.

The 8 & 9 Vict. Cap. 113, "The Documentary Evidence Act of 1845," enacts that whenever by any Act now in force or hereafter to be in force, any certi-

ficate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of Justice, or before any legal tribunal, or either House of Parliament, or any committee of either House or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, *without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person* appearing to have signed the same and without any further proof thereof, in every case in which the original record could have been received in evidence. No proof is required of the seal, signature, or official character of any British Ambassador, Envoy, Minister, Charge d'Affaires, Secretary of Embassy or of Legation, Consul-General, Consul, Vice-Consul, Acting Consul, Pro-Consul or Consular Agent in testimony of any oath, affidavit, affirmation or notarial act having been administered, sworn, affirmed, had or done by or before him.

18 & 19 Vict. Cap. 42. section 3.

Section 9 of Lord Brougham's Act, 14 and 15 Vict. Cap. 99, enacts that every document which by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any Court of Justice in *England* or *Wales* without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in *Ireland*, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, *without proof of the seal, or stamp, or signature* authenticating the same, or of the *judicial or official character* of the person appearing to have signed the same. Section 10 contains provisions precisely similar, rendering admissible in England or Wales without proof of seal, &c. documents which are so admissible in Ireland. Section 11 further contains similar provisions rendering admissible to the same extent and for the same purposes in the *British colonies* without proof of seal, &c. such documents as are so admissible in England, Ireland, or Wales.]

14 & 15 Vict. Cap. 99, section 9.

Section 10, *id.*

Section 11, *id.*

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Proof of maps made for purposes of any cause.

[See *ante*, pp. 201—208; and *Niyamatula Khadim, &c.* v. *Himmat Ali Khadim, &c.*, 22 W. R. 519.]

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to collections of laws and reports of decisions.

[See section 38, *ante*, page 211.]

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

Presumption as to powers-of-attorney.

[See also, as to powers-of-attorney, section 33 of the Indian Registration Act. Except for registration purposes, there is no presumption as to the genuineness or otherwise of a registered power-of-attorney.

There is, I believe, no law in force in India which requires a Court, Judge, or Magistrate to authenticate the execution of a power-of-attorney.[1]

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[1] In Bengal Government Circular No. 16 of 21st March, 1871, it was pointed out that the law does not require any Court, Judge or Magistrate to attest

With respect to Notaries Public, see the 41 Geo. III, Cap. 79: 3 & 4 Will. IV, Cap. 70: 6 & 7 Vict., Cap. 90: and 18 & 19 Vict., Cap. 42. The enactment last quoted empowers ambassadors and British diplomatic and consular agents in foreign countries and places to do abroad all such notarial acts which Public Notaries may do in the United Kingdom of Great Britain and Ireland. There is in India no law relating to Public Notaries. Such an enactment is much required.]

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records.

[See *ante*, clause 6, sections 78 and 82.]

Presumption as to books and maps.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place by whom or at which it purports to have been written or published.

[See *ante*, section 36 and note thereto.]

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powers-of-attorney and such like documents; nor does it (except in the case mentioned in section 49, Act II of 1855, which has been repealed and replaced by the above section) attach any peculiar efficacy to such attestations, as compared with attestations by private witnesses. It was at the same time directed that, if such attestation be desired in any case, the application should be complied with, on payment of a fee of two rupees to be realized by stamps.

88. The Court may presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to photographs, machine-copies, and telegraphic messages.

[This section stood as follows in the original draft of the Bill:—

"The Court shall presume that photographs, machine copies, and other representations of material things, produced by any process affording a reasonable assurance of correctness, correctly represent their objects, and that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with a message delivered, or caused to be delivered, for transmission by the person by whom the message purports to be sent."

Presumption as to photographs, machine copies, and telegraphic messages.

The section itself was altered in Committee, but by some oversight the marginal note was left as before.

See explanation 2 to section 62, and clause 2 of section 63, *ante*.]

89. The Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution, &c. of documents not produced.

[As to "shall presume," see *ante*, section 4. With this section read section 66, *ante*, and section 164, *post*.]

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports

Documents thirty years old.

to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be ; but no custody is improper, if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(*a.*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his title to it. The custody is proper.

(*b.*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c.*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

Reason of the Rule.

Such evidence to be scrutinized.

[" By the term ' ancient documents,' says Mr. Taylor, " are meant documents more than thirty years old ; and as these often furnish the only attainable evidence of ancient possession, the law, on the principle of necessity, allows them to be read in Courts of Justice on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but that they purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. No doubt, this species of proof deserves to be scrutinized with care; for, first, its effect is to benefit those who are connected in interest with the original parties to the documents

and from whose custody they have been produced; and next, the documents are not *proved* but are only *presumed* to have constituted part of the *res gestæ*. Still, as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed; and, at any rate, it is deemed more expedient to run some risk of occasional deception than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance, therefore, of evils this kind of proof has, for many years past, been admitted subject to certain qualifications."[1] It need scarcely be remarked that Mr. Taylor's remarks about forgery and fraud have reference to the state of things in England, and were not intended to apply to India. In the case of *Alaka and others* v. *Kasi Chandra Datta and others* (1 W. R. Civ. Rul. 131), it was held by the Calcutta High Court that a patta cannot be taken to be genuine merely from its ancient date, *when there is no evidence of its early existence and publicity*. And in *Gúrú Persad Rai and others* v. *Beikant Chandra Rai and others* (6 W. R. Civ. Rul. 82), it was observed thus:—"There is a rule in the English Law of Evidence, by which, when a document is produced from the proper custody and by the proper person, formal evidence of its execution is dispensed with if the document be more than thirty years old. But the rule goes no further, and should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or jury to reject it, however ancient it may be. Here, assuming the English rule to be applicable to the Courts of this country, the appellants could derive no benefit from it; for, first, not having shown in whose custody the deed had been kept, the rule was not applicable; and, even had this been shown satisfactorily, the Judge had still power to reject the document, if, as in this case, he thought it to be a fabrication."

Mr. Phillips[2] urges that, in order to render ancient documents admissible, proof of some act done with reference to them, or where the nature of the case does not admit of this, proof of acts of *modern enjoyment*, must be given. Mr. Taylor thinks that the absence of such proof should affect merely the *weight* and not the *admissibility* of the instrument;[3] and this appears to be the view that has been taken by the framers of the Indian Act. The above section makes documents *purporting* or *proved* to be thirty years old admissible as evidence without proof of execution, attestation, &c.; but the weight allowed to them

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[1] § 593. [2] Work on Evidence, 276, 278

[3] But see *Malcolmson* v. *O'Dea*, 9 Jur. N. S. 1135.

would properly be inconsiderable where they are not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof. In *Biseshur Bhattacharjya, &c.* v. *G. H. Lamb, &c.* (21 W. R. 22) the Privy Council, speaking of a lease alleged to have been granted in 1806, and of which no public notice, no mention had been made up to 1854, said:—"Now, in order to satisfy the Court that such a document as this was a valid document, intended to operate as a *merasi* tenure, it would be important to prove that possession had accompanied it. The document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it." As to the importance of evidence of possession or of acts done under or in accordance with the document, see *Anand Chandra Púshali, &c. v. Múkta Keshi Debi, &c.*, 21 W. R. 130: and *G. H. Grant* v. *Bejnath Tewari*, 21 W. R. 278.

Proper custody.

On the subject of proper custody, Chief Justice Tindal made the following remarks in the case of *The Bishop of Meath* v. *The Marquis of Winchester*:[1]—"Documents found in a place in which, and under the care of persons with whom, such papers might *naturally and reasonably be expected to be found*, are precisely in the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit.* If documents continue in such custody, there never would be any question as to their authenticity, but it is when documents are found in other than their proper places of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they were actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree—some being more so, some less—and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases." In *Devaji Gayaji* v. *Godabhai Godbhai* (2 B. L. R, P. C. 86) the Lords of the Privy Council said:—"With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships' opinion, sufficient to state that the

[1] Bingham's New Cases, 200—202.

bond was produced in the usual manner by the persons who *claimed title under the provisions of it*, and who therefore were entitled to the possession of it; so that the bond must be held to have come from the proper custody." See also, as to proper custody, *Mahomed Aizaddi Saha* v. *Shaffi Mula*, 8 B. L. R. 29 : *Guru Das Dey* v. *Sambhunath Chakravartti*, 3 B. L. R. 258 : *Faridunnissa, &c.* v. *Ram Onogra Singh*, 21 W. R. 19: *Ekkauri Singh Rai, &c.* v. *Kailas Chandra Mukherji*, 21 W. R. 45: and *Thakur Persad* v. *Basmati Koer*, 24 W. R. 428.

For an exception to the rule, see section 28, Bengal Reg. II of 1819.]

CHAPTER VI.—OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of written contract.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to probate in British India][1] may be proved by the Probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of

[1] The words in brackets were substituted for "under the Indian Succession Act" by the amending Act, XVIII of 1872.

property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a.*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b.*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c.*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d.*) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e.*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment. The evidence is admissible.

[Mr. Taylor reduces to *three classes* the cases falling under the rule, which requires the contents of a document to be proved by the document itself, if its production be possible, *viz.*:—

I. Oral evidence cannot be substituted for any *instrument which the law requires to be in writing.*

II. Oral evidence cannot be substituted for the written evidence of any *contract which the parties have put in writing.*

III. Oral evidence cannot be substituted for any writing, *the existence or contents of which are disputed,* and which is *material to the issue* between the parties, and is not merely the memorandum of some other fact.

Class I.—where the law requires writing.

The words "*in all cases in which any matter is required by law to be reduced to the form of a document*," in the above section, indicate the first class. Instances of this class in India are:—the depositions of witnesses in civil cases (sections 182-190 of the Civil Procedure Code, Act X of 1877), and in criminal cases (sections 332 to 339 of the Code of Criminal Procedure, Act X of 1872); judgments and decrees in civil cases (sections 200-206, 360, and 571-579 of the Code of Civil Procedure); judgments and final orders of Criminal Courts (sections 463—464 of the Code of Criminal Procedure); the examinations of accused persons (section 346, *id*); an acknowledgment which extends the period of limitation (section 19 of Act XV of 1877); agreements made without consideration (section 25 of the Indian Contract Act, IX of 1872); contracts for reference to arbitration (exception 2, section 28, *id*); an authority to incumber an under-tenure section 16 of Act VIII, B. C. of 1865); and wills[1] (section 50 of Act X of 1865, extended to Hindús, &c. by Act XXI of 1870). There is no Statute of Frauds in India out of the Presidency Towns;[2] and it may seem that within those limits it applies to European British subjects only (see *John Borradaile and another* v. *Chinsukh Bakshiram*, 1 Jur. O. S. 70)

Deposition, &c. informally taken.

Under English law, when the written deposition of a witness or examination of a prisoner has been *informally* recorded, or when it is clearly proved that no writing was made, parol evidence of the statement made by the witness or the prisoner is admissible. The case of an informal deposition has not been specially provided for in India. The last portion of section 346 of the Code of Criminal Procedure admits oral evidence of the *statement made by a prisoner* when the writing is informal. Where no writing at all has been made, it may be argued that oral evidence is admissible, there being no document, and such evidence not being therefore in substitution of, or liable to be excluded by, documentary evidence.

Class II — where the parties have put the contract in writing.

The *second* class—*viz.* where the parties themselves have put the contract in writing,—is indicated by the words "*When the terms of a contract, or of a grant, or of any other dispositon of property, have been reduced to the form of a document, &c.*"

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[1] By section 105 of the Succession Act, *charitable bequests* must not only be in writing, but also, where the testator has a nephew or niece or nearer relative, must have been executed not less than twelve months before his death, and must have been within six months of their execution deposited in a place provided by law for the custody of wills.

[2] The Madras High Court appears to think that the Statute applies to British born subjects in the Mufassil, see *Mattya Pillai* v. *Western*, 1 Mad. Rep. 27.

"Here," says Mr. Taylor, "the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts, the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement."[1] And Domat says.[2]— "The force of written proof consists in this: men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with the view of laying down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written. Thus contracts are written in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law as to what has been agreed on. . . The writing preserves unchanged the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves—that is, *by the inspection of the originals*." In all proceedings, therefore, civil or criminal, in which the issue depends in any degree upon the *terms* of a contract, the party whose witness states that it was reduced to writing must either produce the instrument or show good reason for not doing so (see section 144, *post*). Thus, for example, in a suit for arrears of rent, if it appear that there was a written agreement, the *rate*[3] of rent can be proved only by producing it or giving secondary evidence of its contents when such evidence is admissible.

Class III—where existence or contents of writing are disputed.

In the *third* place, oral evidence connot be substituted for any writing *the existence or contents of which are disputed, and which is material to the issue* between the parties, and is not merely the memorandum of some other fact. Thus a witness connot be asked whether certain statements were published in a newspaper, nor as to the contents of account-books; but the newspaper and the account-books must be produced. This class of cases is sufficiently provided for by section 64, *ante*.

Admissions.

"In stating that oral testimony cannot be substituted for any writing included in either of the three clases above mentioned," says Mr. Taylor, "a tacit exception must be made in favour of the parol admissions of a party, and of his acts amounting to admissions, both of which species of evidence are always received as *primary* proof against

[1] § 872.

[2] Civil Law, Book 3, Title 6, § 2.

[3] In *Augustien* v. *Challis* (1 Exchequer Reports 280) Alderson, B. said—"You may prove by parol the *relation of landlord and tenant*, but without the lease you cannot tell whether any rent was due." This is doubtless law under the Evidence Act in India.

himself and those claiming under him, although they relate to the contents of a deed or other instrument, which are directly in issue in the cause" (§ 381). On this point the Indian Evidence Act introduces a stricter rule than has been followed in England, *oral* admissions of the contents of documents not being admissible as primary, but only as secondary evidence (see section 22, *ante*). *Written* admissions of the existence, condition or contents of a document are admissible under clause (*b*), section 65, *ante*, without notice and without proof of loss, &c.; but they are only *secondary* and not *primary* evidence. Clauses (*a*), (*b*), (*c*), &c. of section 65 are disjunctive.

The first *Exception* is in accordance with English law. Due appointment may fairly be presumed from acting in an official capacity, it being very unlikely that any one would intrude himself into a public situation which he was not authorized to fill; or that, if he wished, he would be allowed to do so. With reference to *Exception* 2, it was decided in the case of *Brajanath Dey Sircar* v. *S. M. Ananda Mayi Dasi* (8 B. L. R. 219) that probate of a will granted under Act X of 1865 and Act XXI of 1870 is evidence of the contents of the will against all parties interested thereunder. This decision turned on the interpretation of the Acts just mentioned, and was contrary to the rule previously followed; see *Sharo Bibi* v. *Baldeo Das*, 1 B. L. R. O. C. 24; and *Srimati Jaikali Debi* v. *Sibnath Chatterji*, 2 B. L. R. O. C. 1. In the case of probate granted otherwise than under the above Acts, the old rule would have prevailed but for the alteration made by the amending Act and indicated by the brackets. In connection with the subject of wills, may be noticed section 208 of the Indian Succession Act, X of 1865, under the provisions of which, if a will has been lost or mislaid *since the testator's death*, or has been destroyed by wrong or accident, and not by any act of the testator, probate may be granted of a copy or the draft, if such have been preserved. By section 209, when the will has been lost or destroyed, and no copy has been made, nor the draft preserved, probate may be granted of its contents, if they can be established by evidence, which, of course, includes oral evidence. Some difficulty may arise in the construction of these sections owing to the use of the words "since the testator's death" in section 208, which therefore does not provide for the case of *a will lost or mislaid during the testator's lifetime, a copy or the draft being still in existence.* The loss to which section 209 refers, is not limited by any restrictive words, and may perhaps include loss during the testator's lifetime or after his death. The result seems to be that, if a will be lost or mislaid during the testator's lifetime, and a copy or the draft be preserved, *this* secondary evidence is not admissible to prove the will; but, if there be no copy or draft, oral evidence is admissible: but this result could scarcely

have been intended. In the case of *destruction* no difficulty arises, as neither section contains words restricting the meaning to destruction either before or after the testator's death. As to *Explanation* 1, see Illustration (*a*).

Bought and Sold Notes.

The subject of *bought and sold Notes* may be noticed here. The authorities at English law seem to establish that bought and sold notes constitute the contract when they have been transmitted to the principals, when they agree, and when they have been signed so as to satisfy the Statute of Frauds. Here it may be said, that all the circumstances indicate it to have been the intention of the parties that the writing should be the actual contract. Whether, when the bought and sold notes disagree materially, resort can be had to the broker's book, is a point upon which there has been some conflict of opinion. The question here involved is really whether the notes or the book constitute the contract. Where there is no book,[1] or where no writing is required by law, and parol evidence of the contract is offered, the question would similarly appear to be, what constitutes the contract—the notes or the oral agreement? In *Rogers* v. *Hadley*,[2] Wilde, B. said:—"No doubt the bought and sold notes are *primâ facie* evidence of the contract between the parties, but they are not necessarily the real contract. It is still competent for the defendants to show that they were not the contract. The plaintiff has to prove not only that they were signed, but that they were signed as the contract between the parties." In a recent case, referred by the Calcutta Court of Small Causes to the High Court, the question for decision was whether parol evidence was admissible where there was a variance between the bought and sold notes. Couch, C. J. said:—"It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence the existence or terms of a contract on which he could maintain the action. In *Sievewright* v. *Archibald* (17 Q. B. 103) a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds; and Mr. Justice Erle's opinion that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree was in accordance with that of the other Judges. Mr. Justice Patteson says:—'I consider that the memorandum need not be the contract itself, but that a contract may be made without writing; and if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent,

[1] It is only in London that brokers are bound to keep books.

[2] 11 W. R. 1074.

he being the party to be charged thereby, the Statute is satisfied'; and the ground of his judgment is, that where the bought and sold notes are the only writing, and they differ materially, the Statute is not satisfied. Lord Campbell says: 'I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract. Circumstances may be imagined in which they might be used as a memorandum of a parol agreement . . . . What are called the bought and sold notes were sent by him (the broker) to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them . . . In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part-acceptance or part-payment, the Statute of Frauds has not been complied with; and I agree with my brother Patteson in thinking that the defendant is entitled to the verdict. There may be a complete binding contract, if the parties intend it, although bought and sold notes are to be exchanged, or a mere formal contract is to be drawn up. This is shown by *Heyworth* v. *Knight* (38 L. J. C. P. 298). If the bought and sold notes do not agree, they cannot be used as evidence of the contract, but we cannot agree with the First Judge that their differing, and not being returned, is positive evidence that, at the conclusion of the negotiation, the parties did not agree, the fact being, as I think, that the negotiation was concluded, and the contract made, before the notes were written and they were sent by the broker to his principals by way of information. To support the opinion of the First Judge, it would be necessary that there should exist a custom between merchants that they should not be bound until regular bought and sold notes have been exchanged" (*Howard Clarton* v. *D. N. Shaw*, 9 B. L. R. 245).[1]

As to *Explanation* 2, see Explanations 1 and 2, section 62, *ante*. In connection with *Explanation* 3, read Illustrations (*d*) and (*e*). In the first case here put, the incidental mention of what was done on another occasion had nothing to say to the *terms* of the contract embodied in writing. In the second case, the writing was merely a memorandum of the fact of payment. It may be useful to give a few more examples, it being more difficult to determine when the writing may be dispensed with than when it must be produced. If, during an employment under a written contract to repair the inside of a house, an order be given verbally for additional and distinct

[1] See also Taylor, §§ 390—393.

repairs or work on the outside of the house, the writing need not be produced in an action to recover for the latter. If the fact of the occupation of land be in issue without respect to the terms of the tenancy, this fact may be proved by parol evidence, such as payment of rent or by the evidence of a witness who has seen the tenant occupy, notwithstanding that the occupancy be under a written agreement; see for example *Kedarnauth Joaddar, &c.* v. *Sharfirnissa Bibi*, 24 W. R. 425. Partnership may be proved by parol evidence of the acts of the parties without producing the written deed of partnership. So the fact of birth, baptism, marriage, death, or burial may be proved by oral testimony notwithstanding the existence of registers of these occurrences; for, says Mr. Taylor, these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact.]

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want [or][1] failure of consideration, or mistake in fact or law.

[See, as to the rectification of instruments erroneously drawn through fraud or mistake, Chapter III of the Specific Relief Act, I of 1877.]

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[1] The word in brackets was substituted for "of" by section 8 of the amending Act, XVIII of 1872.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

[See section 132 of the Indian Contract Act, IX of 1872.]

Proviso (3).—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved ; provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a.*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b.*) A agrees absolutely in writing to pay B. Rs. 1,000 on the 1st March, 1873. The fact that at the same time an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(*c.*) An estate called 'the Rampur tea estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(*d.*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B as to their value. This fact may be proved.

(*e.*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f.*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g.*) A sells B a horse, and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(*h.*) A hires lodgings of B, and gives B a card on which is written—'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(*i.*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

[See Illustration (*e*), section 91, *ante*.]

(*j*.) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

[The language of this section is a little ambiguous. The words "*No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, &c.*" correspond with and have clear reference to the words "*contract, grant, or other disposition of property*" in the beginning of the section; but their application to "*any matter required by law to be reduced to the form of a document*" is not so evident. If the matter required by law to be reduced to writing be a deposition, for example, evidence of an oral statement appears to be admissible for the purpose of contradicting the writing in cases other than those included in the provisoes that follow. See *ante*, as to the words "shall presume" in section 80: and see Illustrations (*a*) and (*b*) to section 121, *post*.

Oral evidence to contradict, vary, add to, or subtract from the terms of the writing, is excluded only as *between the parties to the instrument or their representatives in interest*. Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (Section 99, *post*). But can such persons give evidence to *contradict, add to, or subtract from* the writing? If Section 99 had not been inserted in the Act, this evidence would clearly be admissible, inasmuch as Section 92 excludes it only as *between parties*, &c.: but it may be said that the use of "*varying*" only in Section 99 and the omission of "*contradicting, adding to, or subtracting from*" point to the admission of oral evidence when tendered by persons not parties in the case expressed, and to its exclusion in the cases omitted—*Expressio unius personæ, vel rei, est exclusio alterius*.

Persons not Parties may give oral evidence.

Illustrations (*a*), (*b*), and (c) afford instances of oral evidence which would contradict the writing, and which would therefore be inadmissible.

The rule that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument*, is founded on the obvious inconvenience and injustice that would result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties were liable to be controlled by what Lord Coke expressively calls *the uncertain testimony of slippery memory*. So Starkie says,—"It is like-

Reasons for excluding oral evidence.

wise a general and most inflexible rule that, wherever written instruments are appointed either by the requirements of the law, or *by the compact of parties*, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principal and policy: of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence: *of policy*, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by *loose collateral evidence*. . . . Where the terms of an agreement are reduced to writing, the document itself being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, so long as it exists for the purposes of evidence."

This rule is, however, not infringed by the admission of parol evidence under the proper plea to show that the instrument is altogether void, or that it *never* had any legal existence or binding force either by reason of forgery or *fraud* or for the *illegality* of the subject-matter, or for a want of due execution and delivery: or to show that the writing was obtained by duress, or that the party was incapable of binding himself by reason of some legal impediment, such as infancy, coverture, idiotcy, insanity, or intoxication. The want or failure of consideration may also be proved by parol, and if no consideration is stated, one may be proved by extrinsic oral evidence. "The same general rule prevails in equity, as at law," says Mr. Story,[1] "that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments: and that the interpretation of them must depend upon their own terms. But in cases of *accident, mistake*, or *fraud*, Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat, the terms of written instruments." These and other exceptions to the rule are embodied in the *provisoes* to the section.

Exceptions to the rule.

There was a course of decisions in Bengal which seemed more or less to favour the position that oral evidence could be admitted to show that an instrument purporting on the face of it to be a deed of absolute sale, was really intended by the parties to operate as a mortgage merely, in consequence of there being a contemporaneous oral agreement that the property should be reconveyed on repayment with interest of the money which formed the consideration for the conveyance. How far this view was really warranted by the cases

Conveyances in Bengal alleged to have been intended to operate as mortgages merely.

1 Equity Jurisprudence, Vol. II, page 750, § 1531.

relied on in support of it, is now immaterial, as the law is no longer doubtful. It will, however, be useful to refer to the case (*Kashinath Chakravartti* v. *Chandi Charan Bannerji*, 5 W. R. Civ. Rul. 68) which finally settled the law and established the principle which has been incorporated in the Indian Evidence Act. Peacock, C. J. in whose opinion the majority of the Full Bench concurred, said:—"I am of opinion that verbal evidence is *not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import.* If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning, that he intends to sell absolutely, he cannot by mere verbal evidence show that, at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage. It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the Mufassil without writing. . . . . But, admitting that the law allows sales of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses, and was intended to express. . . . . Without holding that every rule of the English Law of Evidence is to be applied to transactions in the Mufassil, I have no hesitation in saying that a rule of evidence, allowing a contract expressed in writing in words which the parties intended to use, and of which they knew the import could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing but something very different, would lead to the grossest fraud, and would open the widest door to perjury in support of fraud. . . . . If mere verbal evidence is admissible in this case to contradict a written contract, it would apply to every other case; and a man who writes "*one thousand*" intending to write "*one thousand*" might prove that, by a verbal agreement, the words "*one thousand*" were not intended to mean "*one thousand*" but only "*one hundred.*" Nothing could be more dangerous than the admission of such evidence. Further, if it be held that such evidence is admissible, *the whole effect of the new Registration Act would be frustrated.* If an absolute deed of sale of land is registered, it could not be controlled or proved to be conditional by an unregistered *ekrarnamah*, because both are instruments relating to land within the meaning of Act XVI of 1864, section 13; but a mere verbal contract would not be an instrument within the meaning of that section.

If an absolute deed of sale could be controlled or modified by a contemporaneous verbal agreement, showing that it was intended to be a mortgage, an absolute deed of sale of land registered could be modified by an unregistered verbal agreement, as a verbal agreement cannot and is not required to be registered. This does not necessarily show what the law is; but it behoves us, in deciding this case, not to admit a principle which must necessarily lead to such results, unless we find it clearly and unequivocally established . . . . I do not know that the Hindú or Mahomedan law allows a written document to be altered by contemporaneous verbal statements. It is unnecessary to enter into that question here. It is sufficient to say that, if they did, we are not bound by the Mahomedan or Hindú rules of evidence, and that they were far more stringent than ours. . . . . The plaintiff in the present case alleged that he took possession in 1266, and that in 1270 the defendant forcibly dispossessed him. The defendant says that plaintiff never took possession, and that he was never forcibly ousted. If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it, therefore, becomes material to try whether the plaintiff was ever in possession, and forcibly dispossessed, as alleged by him, and whether, having reference to the amount of the alleged purchase-money advanced, and to the value of the interest alleged to be sold, *and the acts and conduct of the parties*, they intended to act upon the deed as an absolute sale, or to treat the transaction as a mortgage only: for I am of opinion that *parol evidence is admissible to explain the acts of the parties*, as for example, to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession, and that the plaintiff never had possession, as alleged by him, and was never forcibly dispossessed." The case was accordingly remanded to the Lower Court that it might consider certain acts and conduct of the parties, and with reference to them determine whether the transaction was an absolute sale or a mortgage. With reference to this order it was observed, in a subsequent case, that there may be some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which, after all, are only indications of such unexpressed unwritten agreement between the parties (*Madhab Chandra Rai* v. *Gangadhur Samant*, 3 B. L. R. 86). It may, however, be that this evidence of conduct was admitted not so much to vary or contradict the written instrument as to show that the parties had mutually *waived* the contract as embodied in writing, or that the writing was not really the contract (see case at 7 Mad. H. C. Rep. 189, and authorities there quoted.) The report

shows that a considerable period had elapsed, and that several transactions had taken place between the execution of the writing and the suit brought.—See also *Phelú Maní Dasí* v. *Girish Chandra Bhattacharjya and others*, 8 W. R. Civ. Rul. 515: *Bholanath Khettri* v. *Kalí Persad Agarwala*, 8 B. L. R. 91: *Mutí Lal Seal* v. *Anand Chandra Sandel*, 5 Moo. Ind. Ap. 72: *Shah Makhan Lal* v. *Sri Krishna Singh*, 2 B. L. R. P. C. 48: *Mussamat Ram Dey Koer* v. *Babú Bishen Dyal Singh*, 8 W. R. Civ. Rul. 339: *Nando Lal Mitter*, &c. v. *Prosonno Mayi Debi*, 19 W. R. 333: *Ram Dúlal Sen* v. *Radhanath Sen*, 23 W. R. 167: and *Banápa*, &c. v. *Sundardas Jagjivandas*, I. L. R. 1 Bom. 333. In connection with *Proviso* (1) should be read Illustrations (*d*) and (*e*). The latter throws light on the words "*or which would entitle any person to any decree or order relating thereto.*" Where neither party to the contract is in error as to the matters in respect of which they are contracting, but there is a mutual error in the reduction of the contract into writing, there the Court interferes for the purpose of *re-forming* the contract and not of rescinding it.[1] As to *mistake*, see also sections 20, 21, and 22 of the Indian Contract Act, IX of 1872: and *Babú Dhanpat Singh Dugar Rai Bahadúr* v. *Sheikh Jawahir Ali*, 8 W. R. Civ. Rul. 152, a case to be distinguished from Illustration (*c*). As to *fraud*, see section 17, read with sections 14 and 19 of the Indian Contract Act: section 48 of the Indian Succession Act, X of 1865: *Manohar Das and others* v. *Bhagabatí Dasí*, 1 B. L. R. O. C. 19 (Fraud on a *parda nishín* lady): *Mathura Pandey* v. *Ram Rucha Tewari*, 3 B. L. R. Civ. Rul. 108: and *Shah Makhan Lal* v. *Srikrishna Singh*, 2 B. L. R. P. C. 49 (a party cannot show true nature of transaction by proof of fraud for his own relief, and insist on its apparent character to prejudice his adversary—cannot approbate and reprobate). As to *intimidation*, see section 15 of the Indian Contract Act and section 48 of the Indian Succession Act.

As to *illegality*, see Sections 23 and 24 of the Indian Contract Act; Section 114 of the Indian Succession Act; and Section 43 of the Indian Penal Code. As to *want of capacity*, see Sections 11 and 12 of the Indian Contract Act. As to *want or failure of consideration*, see Section 25 of the Indian Contract Act: Illustration (*i*) above: *Chaudhri Debi Persad and Bani Persad* v. *Chaudhri Daulat Singh*, 3 Moo. Ind. Ap. 347 (statement in deed of compromise of payment of consideration not conclusive): and *Mussamat Ramdi Kunwari and another* v. *Babu Sibdiyal Singh*, 7 W. R. Civ. Rul. 334, which case is no longer law.

With *Proviso* (2) should be read Illustrations (*f*), (*g*), and (*h*).

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[1] Fry on Specific Performance, page 222, § 500.

The last exemplifies *formality* and the absence thereof. See also *Mohan Lal Rai* v. *Urnapurna Dasi and others*, 9 W. R. Civ. Rul. 567, in which oral evidence was admitted to show the boundaries of land let under a *patta* which contained no boundaries.

With *Proviso* (3) read Illustration (*j*). An *escrow* is a writing deposited with a third person to be by him delivered to the person whom it purports to benefit upon the performance of some condition upon which only the writting is to have effect.

Escrow.

In *Mahsan Ali and others* v. *Balasu Koer* (Hay's Rep. 577), it was held that, where a deed of sale of a portion of an estate was delivered *to the party in whose favour it had been executed*, evidence could not be admitted to show that it was intended to operate as an escrow only, as might have been the case had it been delivered to a *third party*. The report of this case is not very clear, and the decision would seem not to be in accordance with *Pym* v. *Campbell*, 25 Law Journal, Q. B. 277; and *Davis* v. *Jones*, 17 Com. Bench Rep. 625, which are followed in the above *Proviso*. An important example of the application of the principle will be found in *Guddalur Ruthna Mudaliyar* v. *Kumathar Arunnuga Mudaliyar*, 7 Mad. H. C. Rep. 189.

Proviso (4) alters the law as stated in *Kashinath Chakravartti* v. *Chand Charan Banerji* (*ante*, page 413) and by Lord Denman in *Goss* v. *Lord Nugent*,[1] who said:—"After an agreement has been reduced into writing, it is competent to the parties, at any time before breach of it *by a new contract not in writing*, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." Where writing is by Statute required for the new contract, of course it must be in writing. But where writing is not required for the *new contract*, the mere fact of its being necessary for the *old contract* rescinded or modified will not necessitate the new contract being written. Under the above proviso, however, the new contract cannot be a verbal one in cases in which the old contract (1) is by law required to be in writing, or (2) has been registered.—*Nihil tam conveniens est naturali æquitati quam unum quodque dissolvi eo ligamine quo ligatum est.*[2]

Proviso (5).—This rule of annexing incidents by parol is generally applied in mercantile or other dealings, in which *known usages* prevail,

[1] 5 Barnwall and Adolphus' Reports, 65.

[2] "Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound."

with reference to which the parties are presumed to have contracted. It also rests on the presumption that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject-matter. If, therefore, the written contract contain express provisions on the subject of the usage or custom, parol evidence will be inadmissible, as this would vary or alter the writing. With reference to usage or custom, see *ante*, pages 93-102: *Jago Mohan Ghose* v. *Kaisrichand*, 9 Moo. Ind. Ap. 256 (neither by the English nor the Hindu law, unless there be mercantile usage, can *interest* be imported into a contract which contains no stipulation to that effect): *Kunj Behari Patak* v. *Shiva Balak Singh*, 1 N.-W.-P. Rep. Full Bench, 119 (custom of digging wells, &c.): *The Bank of Hindustan, China, and Japan* v. *Sedgwick and Bulkly*, I. Jur. N. S. 107 (promissory note—stamp—usage): *Indar Chandra Dugar* v. *Lachmi Bibi*, 7 B. L. R. 682 (evidence of custom as to hundi excluded by express terms of writing): *Macfarlane and others* v. *Carr and others*, 8 B. L. R. 459 (custom at variance with contract): and *Hari Mohan Beisakh and another* v. *Krishno Mohan Beisakh and another*, 9 B. L. R. Appen. 1 (hundi—local custom at Dacca).

With reference to the use and value of this evidence, the following observations of Mr. Justice Story are important:—"I own myself no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade to control, vary, or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-selected principles of law: and I rejoice to find that, of late years, the Courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs and to discountenance any further extention of them. *The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character.* It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied."—See Section 98. *post.*—"But I apprehend that it can never be proper to resort to any usage or custom

to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties." The Indian Evidence Act adopts the principles here advocated.

As to *Proviso* (6), if a man purchase "the Rampur estate" or "Mr. Smith's house in Calcutta," or "the steamer Hindustan" or "the race-horse Jupiter," without further words of description, oral evidence alone can show the particular thing sold and purchased.]

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a.*) A agrees in writing to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.'

Evidence cannot be given to show which price was to be given.

(*b.*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

[This is what has been known from the time of Lord Coke as a *patent ambiguity* or an ambiguity apparent on the face of the instrument, as distinguished from a *latent ambiguity*, which, non-apparent on the face of the instrument, comes to light only when the language of the writing is sought to be applied to existing facts. So agreements, the meaning of which is not certain or capable of being made certain, are void, Section 29 of the Indian Contract Act, IX of 1872.]

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Exclusion of evidence against application of document to existing facts.

Illustration.

A sells to B by deed 'my estate at Rampur containing 100 bighas.' A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

[Such evidence, if admitted, would contradict the writing.]

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Evidence as to document unmeaning in reference to existing facts.

Illustration.

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

[The legal maxim is—*falsa demonstratio non nocet*—a false description does not vitiate the document: and the principle is, that so much of the description as has no application being laid aside as mere surplusage, what remains is sufficient to identify the thing really meant. The words "in Calcutta" in the Illustration have no application. The words "my house" have application, when it is shown that A had a house at Howrah. This is a case of *latent ambiguity*. In cases of this kind, evidence of conduct is of great value. As to such evidence, see *ante* note to Section 8.]

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons

Evidence as to application of language which can apply to one only of several persons.

or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(*a.*) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(*b.*) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Sindh was meant.

[This also is a case of *latent ambiguity*.]

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell B 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

[This is another case of *latent ambiguity*. A further illustration is afforded by a class of cases, which not unfrequently occur in India, where there is a description of land in a conveyance, lease, or other document, such a description setting forth the boundaries and then specifying the quantity, as so many acres, *bighas* or the like. Here the maxim *falsa demonstratio non nocet* applies: it is considered to be a mere false description, if there is an error in the quantity: and the land within the boundaries passes by the conveyance or lease, whether it be less or more than the quantity specified (see *Pahalwan Singh* v. *Maharajah Mahessur Baksh Singh Bahadur*, 9 B. L. R. P. C. 169: *Jinat Ali* v. *Ram Dyal*, 18 W. R. 25: *Llwellyn* v. *The Earl of Jersey*, 11 M. & M. 183: *Whitfield* v. *Langdale*, L. R. 1 Chan. 61: Kent's Commentaries Vol. IV s. 466: 2 Smith's Leading Cases, 7th Ed. 523, and Taylor, §§ 1104 and 1105).

English Law.

Mr. Taylor collects from the cases decided under English law the following rules:—*First*, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author. *Secondly*, if the description of the person or thing be *partly applicable and partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible. *Thirdly*, if the *description be partly correct and partly incorrect*, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is inapplicable to any subject, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by neglecting the erroneous statement. *Fourthly*, if the description be wholly inapplicable to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe. *Fifthly*, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect." (§ 1109.), Rule I, here given, correspond with Section 96: Rule II with Section 97: Rules III and V with Section 95: and Rule IV with Section 94: while no distinction appears to be made in any case between *declarations of intention* and other evidence.]

Evidence as to meaning of illegible characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

[In connection with this section, see the penultimate clause of

Section 49, *ante*. The Illustration is the case of *Goblet* v. *Beechey* (3 Simons's Chancery Reports, 24), where it was held that models were meant.]

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Who may give evidence of agreement varying terms of document.

Illustration.

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

[*Query*—Was the use of the term "varying" only intended to exclude evidence *contradicting*, &c. ?]

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of Wills.

Saving of provisions of Indian Succession Act relating to wills.

[The provisions of the Indian Succession Act as to the construction of Wills are contained in Part XI, Sections 61 to 98, inclusive.

With Section 100 ends Part II, Chapters V and VI, relating to documentary evidence. There are, however, a few other points connected with documents which it may be convenient to notice. In interpreting the Acts of the Indian Legislatures, it will be well to bear in mind the provisions of the General Clauses' Acts, passed for the purpose of shortening the language used in Acts of those Legislatures. These are—Acts I of 1868, I (M. C.) of 1867, X Bom. C.) of 1866, and V (B. C.) of 1867. As to Acts of Parliament, see 13 & 14 Vict., Chap. 21.

General Clauses' Acts.

The Evidence Act provides for certified *copies* of public documents. Cases, however, may arise in which it may be necessary or advisable to inspect the *originals*. Section 137 of the Code of Civil Procedure empowers a Civil Court of its own accord, and in its discretion upon the application of any of the parties to a suit, to send for, either from its own

Power to send for Original Public Documents.

‡ Note to page 427 & page 437-8.

Documents held to require registration

1. a daul darkhast - Saydar Reza v. Amzad ali I.L.R. 7 Cal 703 S.C. 10 C.L.R. 121; Lal Jha v. Negroo I.L.R. 7 Cal 717.
2. a favourable lease in Madras for a term of 40 years Ramaswami Chetti v. Collector of Madura I.L.R. 6 I.A. 170 [489
3. Receipt showing release of mtge lien Basawa v Kalkappa I.L.R. 2 Bom but see Gangaparsali v. Mahomed Yasin 20 W.R. 334.
4. Receipt for Rs. 250 showing extinguishment of Co. mtgee's lien Ramappa v. Umana I.L.R. 7 Bom 123 - otherwise where its used to show state of acct. between mtgagor & mtgee Shidlingappa v. Chanbasappa I.L.R. 4 Bom 236 followed in Annappa v. Ganapati I.L.R. 5 Bom 181.
5. Patta for a year providing for continuance till grant of another Venkatachellam Chetti v Andian I.L.R. 3 Mad 358. cf Apu Budgavda v Narhari Annaji I.L.R. 3 Bom 21.
6. Endorsement on returned conveyance sought to be used as a retransfer - Umedmal Moliram v. Davu I.L.R. 2 B. 547

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Documents held not to require registration. p 437-8.

1 Sale certificate of immoveable ppty granted by a Civil Ct.
Prokash Chandra Das v Tara Chand I&R 9 Cal 82 F.B.
Masaratun Nisa v. Adit Ram I&R 5 all 568 F.B.
Contra Bombay 10 Bom 435 [see page 437 supra]
Lalbhai Lakhmidas v. Nabahmir Kamaludin.
12 Bom 247. Shivram Narayan Mekal v. Roogi
Sakharam Pradhan. I&R 7 Bom 255

2. Written acknowledgement of partition of immoveable ppty Sakharam v. Madan I&R 5 Bom 232

3. agreement for the sale & purchase of immoveable ppty subject to purchaser's solicitors approval & on his approval to refund of earnest money &c. Shrigopal Mullick v. Ram Charan Nuskar I&R 8 Cal 856 L.R. 14.

4. Inform lease but really usufructuary mtge less than 100 Rs

5. Loan of Rs 95 upon land with possession for 4 years at yearly rent Rs 8.12 - Rs 2 to be paid to govt. & balance to be retained by lender as interest on Rs 96 lent.
Ram Dulari Koer v. Thakur Rai I&R 4 Cal 61

6. Mtge bond having principal sum less than Rs 100 but the total interest over Rs 100 Karan Singh v. Ram Lal I&R 2 all 96
Habibula v Nakched Rai I&R 5 all 447 F.B.
Narayan Chetti v. Jurnivappa Chetti I&R 1 mad 378
Sadagopayyangar v Dorasami Sastri I&R 5 mad 214

overruling 3 all 157
Do 422
1 all 274

but see contra Kattamari Jagappa vs 422C
Padalu Latchappa 2 SR 5 Mad 119
Nana bin Lakshman v. Anant Babaji 2 SR 2 B 353
Korban ali Mirdha v Sarodaprasad 2 SR 10 Cal 82
Panchi Dasi &c v Ahmedula 12 C & R 444.
Ram Dulari Koer v Thakur Rai 2 SR 4 Cal 61
Rohini Debya v Sib Chandra Chatterji 15 W. R 558.

records or from any other Court, the record of any other suit or proceeding, and inspect the same. Every application made under this section must, unless the Court otherwise directs, be supported by an affidavit of the applicant or his pleader, showing how the record is material to the suit in which the application is made, and that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice. Nothing contained in this section is to be deemed to enable the Court to use in evidence any document which under the Indian Evidence Act would be inadmissible in the suit. Section 365 of the Code of Criminal Procedure empowers an officer in charge of a Police-station or any Criminal Court, considering the production of any document necessary or desirable for the purposes of any investigation or judicial proceeding, to issue a summons to the party in whose keeping such document is believed to be, requiring him to attend and produce such document at the time and place stated in the summons. Reading this last section with the section that follows it in the Code of Criminal Procedure, it must be doubtful if it was intended to refer to public documents. The Code of Criminal Procedure contains no section similar to Section 137 of the Code of Civil Procedure.

It has been already mentioned that there is no Statute of Frauds in India out of the Presidency towns. Contracts which under this Statute must be in writing can therefore be made *orally* in the Indian Mufassil. There are, however, certain contracts, which if they have been made in writing, must be registered in order to have effect; and there are others, the registration of the writing containing which is *optional* but not compulsory. The following sections of the Indian Registration Act, III of 1877, show what documents *must* be registered; what documents *may* be registered; and what are the effects of registration and non-registration:—

Documents of which the registration is compulsory.

Section 17—The documents next hereinafter mentioned *shall* be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or Act No. XX of 1866, or Act No. VIII of 1871, or this Act came or comes into force (that is to say),—

(*a*). Instruments of gift of immovable property:

(*b*): Other non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the *value of one hundred rupees and upwards* to or in immovable property:

(*c*). Non-testamentary instruments which *acknowledge the receipt or payment of any consideration* on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(*d*). Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

Provided that the Local Government may, by order published in the official Gazette, exempt from the operation of the former part of this section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.

Exception of composition-deeds; and of transfers of shares and debentures in Land Companies.

Nothing in clauses (*b*) and (*c*) of this section applies

(*e*) to any composition-deed,

(*f*) to any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property, or

(*g*) to any endorsement upon or transfer of any debenture issued by any such Company,

Documents merely creating right to obtain other documents.

(*h*) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will when executed create, declare, assign, limit or extinguish any such right, title or interest,

(*i*) decrees and orders of Courts, and awards,

(*j*) grants of immovable property by Government,

(*k*) instruments of partition made by revenue officers,

(*l*) certificates and instruments of collateral security granted under the Land Improvement Act, 1871.

Authorities to *adopt a son*, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.[1]

Documents of which the registration is optional.

Section 18. Any of the documents next hereinafter mentioned *may* be registered under this Act (that is to say)—

(*a*). Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit, or extinguish, whe-

[1] For certain agreements which, in order to be binding contracts, *must* be registered, see Section 25 of the Indian Contract Act, IX of 1872.

ther in present or in future, any right, title, or interest, whether vested or contingent, of a value *less than one hundred rupees*, to or in immovable property:

(*b.*) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title, or interest;

(*c.*) Leases of immovable property for any term not exceeding one year, and leases exempted under Section 17:

(*d.*) Instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property:

(*e.*) Wills:

(*f.*) All other documents not required by Section 17 to be registered.

Time from which registered document operates.

Section 47. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

Registered documents relating to property when to take effect against oral agreements.

Section 48. All non-testamentary documents duly registered under this Act and relating to any property, whether movable or immovable, shall take effect against any *oral* agreement or declaration relating to such property, *unless where the agreement or declaration has been accompanied or followed by delivery of possession.*

Effect of non-registration of documents required to be registered.

Section 49. No document required by section seventeen to be registered,

shall affect any immovable property comprised therein,

or confer any power to adopt,

or be received as evidence of any transaction *affecting such property or conferring such power*,

unless it has been registered in accordance with the provisions of this Act.

Registered documents relating to immovables, of which the registration is optional, to take effect against unregistered documents.

Section 50. Every document of the kinds mentioned in clauses (*a*), (*b*), (*c*), and (*d*) of section seventeen, and clauses (*a*) and (*b*) of section eighteen, shall, if duly registered, take effect as regards the property comprised therein, *against every unregistered document* relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Nothing in the former part of this section applies to leases exempted under the proviso in section seventeen, or to the documents mentioned in clauses (*e*), (*f*), (*g*), (*h*), (*i*), (*j*), (*k*), and (*l*) of the same section.

Explanation.—In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July, 1871, not registered under Act No. VIII of 1871 or this Act.

Act III of 1877 is the fourth Registration Act passed within the space of thirteen years (the other three being Acts XVI of 1864, XX of 1866, and VIII of 1871). The impossibility of at once dealing successfully with a new subject of legislation necessitated this repeated revision of the law, which has been directed to remove difficulties as they arose and to reform what was found in practice not to work satisfactorily. Here, as elsewhere, a knowledge of the stages through which the law has passed and of those doubts, to obviate which particular language has been used in the latest enactment, will materially assist in order to understand the text of the law as it stands. Sections 17, 18, and 47 require no particular notice. Testamentary documents, *i. e.* wills, are excluded from the operation of section 48. The registration of written wills is optional. Nuncupative or verbal wills are legal, except in cases to which Act X of 1865 or Act XXI of 1870 applies and requires writing. In section 48 the words "*unless where the agreement or declaration has been accompanied or followed by delivery of possession*" were first inserted in Act VIII of 1871, in accordance with two decisions of the Calcutta High Court—*Selam Sheik* v. *Beidonath Ghatak*, 3 B. L. R. 312, and *Narsingh Porkait* v. *Mussamat Bewah and others*, 5 B. L. R. Appen. 86. In the former of these cases the reason of the ruling will be found fully discussed. The decision in the second case expressly follows that in the first, but the agreement which was here accompanied by possession was a *written unregistered* lease, which the Court however dealt with in the view of a parol verbal contract. Having reference to section 49 of the present Act, it may appear that such an instrument cannot be used at all as evidence of any transaction affecting immovable property of the value of one hundred rupees and upwards; and, there being a writing in existence, section 91 of the Evidence Act will exclude oral evidence of the contract. Where the property is of a value less than one hundred rupees, the unregistered document will be admissible in

Effect of possession under an *unregistered* document.

evidence, but section 50, in giving the priority to a registered over an unregistered document, makes no exception where the latter has been accompanied or followed by possession.

In the case of *Issuri Dasi* v. *Lal Behari Haldar, &c.* (21 W. R. 421), the Calcutta High Court refused to extend the principle, that a later unregistered document shall not prevail over an earlier unregistered document followed by possession, to a case in which the person relying on the unregistered document had been dispossessed by the person claiming under the registered document; and instead of instituting a possessory suit under section 15 of Act XIV of 1859 (see now section 9 of The Specific Relief Act, I of 1877) had sued to recover possession upon proof of title. The application of the principle will be found further considered in *Kirti Chandra Haldar* v. *Raj Chandra Haldar*, 22 W. R. 273.[1]

Section 49 must be read with section 17. The unregistered document is inadmissible as evidence of any transaction affecting the immovable property or conferring a power to adopt. Oral evidence of the transaction will be excluded by section 91 of the Evidence Act. *The result is that gifts of immovable property of whatever value, contracts creating, declaring, assigning, limiting or extinguishing any right, title, or interest of the value of one hundred rupees or upwards in immovable property; certain leases; and authorities to adopt conferred otherwise than by will, if committed to writing and not registered, are incapable of proof and wholly inoperative.* This was the result of the Registration Act even before the Evidence Act came into operation. In the case of *Sheikh Rahmatúla* v. *Sheik Sariatúla Kagchi* (1 B. L. R. F. B. 58) the plaintiff sued to establish his title to certain land which he alleged that he had purchased. There was a written conveyance, which was not registered, owing, as the plaintiff averred, to certain fraudulent objections made before the registering officer by the defendant, the alleged vendor. It was decided that the plaintiff could not have a declaration of title which rested upon the written instrument, it being incapable of being used as evidence because not registered, and

Certain transactions committed to writing but not registered incapable of proof.

[1] See also, as to an unregistered document followed by possession—*Bálárám Nemchand* v. *Appa Valad Dulu, &c.* 9 Bom. H. C. Rep. 121: *Manmal Valad Suratmal* v. *Dashrath Valad Narayan*, 9 Bom. H. C. Rep. 147; *Sudharam Bhattacharjya* v. *Okhai Chandra Bannerji, &c.* 19 W. R. 279: *Girija Singh* v. *Giridhari Singh*, 1 B. L. R. A. C. 14, with which compare *Sudharam Bhattacharjya, &c.* v. *Udha Chandra Bandapadhya*, 10 B. L. R. 380: *Mussamat Batul* v. *Mussamat Waziran*, 8 W. R. Civ. Rul. 300 (under Act XIX of 1843).

parol evidence being inadmissible to supply its place.[1] Peacock, C. J. said in his judgment:[2] "I agree with the remark of the Division Bench in *Manmahint Dasi* v. *Bishen Mayi*" (7 W. R. Civ. Rul. 112), "where 'a party comes into Court resting his claim on a written title which the law requires to be registered, he cannot, when he has failed to register and is in consequence unable to use his title-deed, turn round and say, I can prove my title by secondary evidence.' But the plaintiff in this case wants something more. He is not satisfied to let his contract rest on the verbal contract and possession. He tells the Court that a deed was executed; that he was entitled to have that deed registered; that the defendant went before tha Registrar and fraudulently stated that the deed was not intended to operate as a bill of sale, but merely as a mortgage; that the Registrar consequently refused to register the deed; that the declaration of the defendant and the refusal of the Registrar have cast a cloud over his title, which he asks the Court to dispel by declaring that, looking to the whole of the transaction between the parties, he is entitled absolutely to the lands. It appears that, independently of other considerations, we ought not, unless we can say that the deed operated and was intended to operate as an absolute sale, declare upon the faith of that deed that the plaintiff had a title. If the parties did enter into a complete contract of sale before the deed, our decree will place them in a very different position from that in which they would have been if they had relied upon that verbal contract alone." A Full Bench of the High Court of the North-West Provinces decided to the same effect in *Rájá Krishna Kishor Chand* v. *Mahomed Zakaula and others*, 1 N.-W.-P. Rep. F. B. 148.[3] *In Sheikh Parabdi Sabani* v. *Sheikh Muhammed Hosen* (1 B. L. R. Civ. Ap. 37) the bill of

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[1] See also, on this point, *Crowdie* v. *Kullar Chaudhri*, 21 W. R. 307: and *Sheikh Mahommed Ohid, &c.* v. *Kali Persad Singh*, 24 W. R. 320. In *Súrjo Kumar Bhattacharjya, &c.* v. *Bhagwan Chandra Rai* (24 W. R. 328) and *Dalip Singh* v. *Dúrga Persad* (I. L. R. 1 All. 442), the instrument inadmissible for want of registration was a *receipt*, but oral evidence of the payment of the money was admitted—see illustration (*e*) to section 91, *ante*.

[2] The student is recommended to read the whole report of this case, which, in addition to the able judgment of the Chief Justice, contains the arguments on the other side well put by the late Mr. Justice Mitter.

[3] See also *Prabharam Hazrá* v. *T. M. Robinson and another*, 3 B. L. R. App. 49: *Shankar Bapu* v. *Vishnu Narain*, 1 Bom. H. C. Rep. A. C. 79: *Mussamat Kabulan* v. *Shamshir Ali*, 11 W. R. 16: *Sipahi Singh* v. *Mussamat Chandan*, 2 N.-W.-P. Rep. 160: and *Behari Lal* v. *Kundan Lal*, 7 N.-W.-P. Rep. 103. The cases, *Mir Hilaludin* v. *Chaudhri Abdul Sattar*, 9 W. R. Civ. Rul. 351, and *Bhimal Mahtun* v. *Mussamat Alimassa*, 8 W. R. Civ. Rul. 423, are no longer law.

sale had been duly registered, and the defendant produced an *unregistered ikrarnámah* to show that the transaction was not an absolute sale but only by way of mortgage. Although the *ikrarnámah* was not admissible in evidence, being unregistered, it was held that the Court might look at other and independent evidence supplied by the acts and conduct of the parties in order to discover the real nature of the transaction. This case seems to have proceeded on the principle before adverted to in connection with the case of *Kashinath Chatterji* v. *Chandi Charan Banerji*, *ante*, pp. 413-414.

A deed of sale, purporting to have been made by a Muhammadan woman and her two sons, was presented for registration. The two sons admitted the execution by themselves, but denied that by their mother, and objected to the registration. The deed was registered by the Sub-Registrar. The Allahabad High Court held that, as the execution of the deed was not admitted by the mother, it was improperly registered and could not be received in evidence as against the sons. On appeal to the Privy Council it was held that, according to the true construction of the Act, the registering officer must refuse to register a document *quoad* the persons denying the execution thereof, and *quoad* any person who appears to be a minor, an idiot, or a lunatic—that the law does not however require him to refuse to register a deed, which purports to be executed by several persons, if any one of those persons deny the execution; and that the intention of the Legislature was not to destroy the operation of the deed as regards those who admit the execution, and who are under no disability. The High Court had said in their judgment:—"It has been held by this Court more than once that, unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may in fact have been improperly admitted to registration" (see 7 N.-W.-P. Rep. 185). Their Lordships of the Privy Council considered that this was too broadly stated, if the High Court meant to say that in all cases, where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper registration. They intimated their opinion that a certificate of registration is sufficient to render a document admissible in evidence, and that it is not invalid for this purpose by reason of any defect in the registering officer's procedure. "Undoubtedly," they said, "it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's indorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had

properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position, which *primâ facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by *fraud*, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding (*Muhammed Emaz, &c.* v. *Birj Lal, &c.* L. R. 4 I. A. 166: S. C. I. L. R. 1 All. 465; and see *Sah Makhan Lal Pandy* v. *Sah Kundun Lal*, L. R. 2 I. A. 210; S. C. 15 B. L. R. 228). As to the certificate of registration being conclusive with respect to the registration, see also *Mussamat Rahimunissa* v. *Sheikh Abdúla Khán*, 22 W. R. 319.

Procedure to enforce Registration.

When a registering officer refused to register a document on the ground that the executant denied its execution, or on any other ground, the person claiming under such document, his representative, assign, or duly authorized agent could under the former Registration Acts apply by petition to the District Court in order to establish his right to have the document registered. If the District Court found that the *document had been executed and that the requirements of the Registration Law had been complied with*, an order was made that the document be registered (see sections 73—76 of the repealed Act VIII of 1871). In the case of *Rájá Krishno Kishore Chand* v. *Mahomed Zakaúlah and others* (1 N.-W.-P. Rep. F. B. 148), an opinion was expressed that, apart from the special remedy afforded by the provisions of the Registration Act, a regular suit to enforce registration was maintainable. Peacock, C. J. and the other Judges, who decided the case of *Sheikh Rahmatúla* v. *Sheikh Sariatúla* (1 B. L. R. F. B. 58), were of a contrary opinion, but this point did not actually arise in that case. In *Tulsí Saha and others* v. *Mahadeo Das and another* (2 B. L. R. A. C. 105) it was directly decided by the Calcutta High Court that such a suit was not maintainable, and that the sole remedy was that provided by the Registration Act—see also *Mussamat Súram Batti* v. *Mussamat Badhessúri and others*, 10 W. R. 313. This view was finally approved by the Privy Council in *Fatí Chand Sahú* v. *Lilamber Singh Das, &c.* 9 B. L. R. 433; S. C. 14 Moo.

Ind. Ap. 129. In this case A agreed to purchase from B certain land for Rs. 22,500, and paid this amount upon an *ikrarnámah*, which recited the sale, acknowledged the receipt of the money, and contained a promise to execute a proper deed of sale within a month, as soon as a suitable stamp could be procured. This instrument was presented for registration; but, as B denied its execution, registration was refused. B then sold the land to a third person under a deed of sale which was registered, whereupon A brought a suit, seeking for specific performance by having a deed of sale executed and registered, and also to obtain possession of the property and to set aside the deed of sale executed and registered subsequent to the *ikrarnámah*. The Principal Sadr Amin regarded the *ikrarnámah* as a contract to sell; and, relying upon the cases of *Banwari Lal, &c.* v. *Sungam Lal, &c.*[1] and *Ram Tonú Sarmah Sirkar* v. *Gaur Chandra Sarmah Sirkar*,[2] received it in evidence and gave plaintiff a decree. The High Court reversed this decision, holding that the *ikrarnámah* was not admissible in evidence, as the purport of it was to give the plaintiff an interest in immovable property within the meaning of clause 2 of section 17 of the Registration Act, XX of 1866. An appeal was preferred to the Privy Council. Their Lordships said:—"In this case the appellant brought his suit, which was in the nature of a bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a deed of absolute sale executed; and he added that the suit was also for issuing 'an order for its registration.' Their Lordships understand those words to import a prayer that the deed of absolute sale when executed might be ordered to be registered, and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted with a view to meet the difficulties, which it was apprehended might

[1] 7 W. R. 280—Section 13 of Act XVI of 1864 held not applicable to a document like an *amaldastak*, which was merely preliminary to the main contract or engagement.

[2] 3 W. R. 64—Suit for specific performance of a contract to sell. The instrument acknowledged an advance of Rs. 124 and contained a stipulation that on payment of a further sum of Rs. 800, the plaintiff should receive a share of a taluk. It was held admissible though unregistered, and that a subsequent registered conveyance was not entitled to have precedence over it under Act XIX of 1843. See also *Bhairabnath Khetri* v. *Kishori Mohan Saha*, 3 B. L. R. App. 1 (agreement for a lease held not to require registration): and *Goluk Kissore Acharjyá Chaudhri* v. *Nand Mohan Dey Sirkar*, 12 W. R. 394. These cases must now be held to have been overruled.—In *Haji Abdul Vidona Jonas* v. *Haji Harone Esmile* (7 B. L. R. App. 22) an agreement to execute a lease was held not to require registration.

be occasioned by the prior registration of the defendant's document of a date subsequent to that of the instrument on which the appellant sued. . . . . It appears to their Lordships that, although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act recently passed in India is extremely stringent. Their Lordships have, in the first place, no doubt whatever that the instrument in question is one which, by the seventeenth section of the Act, is required to be registered; that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question, for what in equity did presently operate as a sale of the property. . . The appellant went before the Sub-Registrar, and he appealed to the Registrar. He then unfortunately for himself, through bad advice or some other cause, omitted to proceed as the Act directs under the eighty-fourth section (in which case he might have obtained the registration of the deed), and brought this suit relying on a non-registered deed. He failed to pursue the remedies given him by the Act, at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful though stringent statute, the Judges of the High Court have miscarried in ruling that the document, not having been registered, was inadmissible in evidence and that the plaintiffs' suit had wholly failed." In *Jusab Haji Jáfar* v. *Haji Gul Muhammed* (12 Bom. H. C. Rep. 178) there was a bargain paper executed by the purchaser, reciting that a deed of sale of two houses should be executed and setting forth the payment of Rs. 1,000, earnest-money, out of the price Rs. 8,750, and it was held that registration was not necessary. *Sargent*, J. said :—"The money paid in this case was earnest-money for the performance of the agreement, and not consideration money for the creation of an interest in immovable property. In the case reported at 14 Moo. Ind. Ap. 129, the document was an instrument acknowledging the payment of the entire purchase-money." See also *Mark Ridded Currie, &c.* v. *S. V. Mutú Ramen Chetty*, 3 B. L. R. A. C. 126. In *Valáji Isaji, &c.* v. *Thomas* (I. L. R. 1 Bom, 191) it was observed that the bargain paper in the case of *Jusab Haji Jáfar* v. *Haji Gul Muhammed*, having been executed, not by the intending vendor, but by the intending purchaser, could not operate to create any right, title or interest in the property to be sold; and it was held that a somewhat similar agreement paper executed by the intending vendor required registration, and that it made no difference in the application of the Privy Council's decision, whether the whole or a part only of the consideration had been paid.

There have been many instances of hardship, similar to that which formed the subject of the above remarks of the Privy Council, arising from vendors refusing to assist in obtaining registration after they had received the whole or part of the consideration. Such cases may, however, be regarded as the result not so much of a defect in the law as of the improvidence of vendees, who part with their money too hastily. The danger could easily be guarded against. "A purchaser," said Peacock, C. J. in *Sheikh Rahmatúla* v. *Sheikh Sariatúla*, "can always protect himself, and, if he does not, it is his own fault. He should take care before he pays his purchase-money to get the deed registered, or to obtain an authenticated power from the vendor to authorize some one in whom the purchaser has confidence to register the deed as agent of the vendor. I have seen instances in which a purchaser has refused to pay the purchase-money before he has got the deed registered, or an authenticated power to his own attorney from the vendor appointing him the vendor's attorney to register." Of the two courses here suggested, the latter is more suitable in the Presidency towns than in the Mufassil, where the services of attorneys are unknown. The retention of the purchase-money till after registration will seldom be consented to by the vendor, who is usually apprehensive that after registration the money will not be paid, or at least advantage will be taken of the opportunity to enforce some abatement. Unfortunately, this apprehension is too often justified--punic faith being as common on the one side as on the other. The difficulty has now, however, been removed to a considerable extent by the last Registration Act, III of 1877, clause (*h*) of s. 17 of which exempts from registration any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely *creating a right to obtain another document which will when executed create, declare, assign, limit or extinguish any such right, title, or interest.* The procedure for enforcing registration has also been altered. When execution is denied before a Sub-Registrar, and he on this account refuses registration, any person claiming under the document, or his representative, assign or agent may within thirty days apply to the Registrar in order to establish his right to have the document registered (s. 73). In such case, and also where such denial is made before the Registrar in respect of a document presented for registration to him, he shall enquire (*a*) whether the document has been executed, and (*b*) whether the requirements of the registration law have been complied with (s. 74). If he finds these two points in the affirmative, he shall order the document to be registered (s. 75). If he refuse to order registration, any person claiming under such document, or his representative, assign or agent

may, within thirty days after making the order of refusal, *institute in the Civil Court*, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, *a suit for a decree directing the document to be registered* in such office, if it be duly presented for registration within thirty days after the passing of such decree; and *notwithstanding anything contained in the Act, the document shall be receivable in evidence in such suit* (s. 77).

Unregistered document, the registration of which is compulsory, admissible for collateral purpose.

Returning now to section 49 of the Registration Act, the words "*of any transaction affecting such property or conferring such power*" are important. The effect of these words is, that documents, the registration of which is compulsory, although inadmissible, unless registered, as evidence of any transaction affecting immovable property or conferring a power to adopt, will yet be admissible for other purposes. The principle here involved was established by several decisions under the earlier Acts, and the addition of the above words acknowledged the policy and correctness of these decisions. In *Sham Narain Lal* v. *Khimajit Matoe* (4 B. L. R. F. B. 2) the defendant had borrowed a sum of money from the plaintiff on a mortgage, a lease to the plaintiff's son forming part of the transaction. This lease contained a covenant for registration which the defendant refused to perform. The plaintiff, being therefore unable to acquire a title in the mortgaged property, brought his action for recovery of the money advanced, together with interest. It was objected that the mortgage lease was inadmissible as evidence because not registered: but a Full Bench of the Calcutta High Court held it admissible to prove the agreement to register. It was observed that the defendant could not be allowed to avail himself of the non-registration of the document for the purpose of protecting himself in a suit against him for a breach of his covenant to register; that, if such were the law, the plaintiff would be without a remedy, and the grossest injustice might be perpetrated. In *Lachmipat Singh Dúgar* v. *Mirza Khairat Ali*, (4 B. L. R. F. B. 18,) the instrument was a bond securing the repayment of money lent, and also assigning certain immovable property by way of security for this repayment. The plaintiff sued on the bond for the recovery of the money only; and a Full Bench held that the document was admissible simply for the purpose of enforcing against the obligor personally the payment of the money secured by it, although without registration it would not be admissible as evidence to prove that the obligee was entitled to the security of the land.[1]

[1] See also the following cases:—*Sipahi Singh* v. *Mussamat Chandan*, 2 N.-W.-P. Rep. 166: *Court of Wards* v. *Nita Kali Debi*, 3 B. L. R. A. C. 353: *Monomothonath Dey* v. *Srinath Ghose*, &c. 20 W. R. 107: *Siri Seshathiri Ayyengar* v.

Admission.

When the fact is admitted, to prove which it would be necessary to use in evidence a document, which has not been registered, although registration thereof is by law compulsory, the non-registration cannot effect the decision of the case. The question of registration becomes material only when it is sought to use the document in evidence (*Syud Reza Ali* v. *Bhikan Khan*, 7 W. R. Civ. Rul. 334: *Chedambaram Chetty* v. *Karunalya Valangapuly Taver*, 3 Mad. H. C. Rep. 342). It must, however, be very doubtful whether, if the document itself were put in, any admission of its execution would stand in the stead of registration. There is a difference between admitting the fact to prove which the document is sought to be used and admitting the document itself when put in. Where in consequence of the admission it becomes unnecessary to use the document at all, the fact of non-registration may be immaterial; but it is submitted that it would be otherwise where the document is used. In *Somu Gurukkal* v. *Rangammal, &c.* (7 Mad. H. C. Rep. 13) it was held that no effect could be given to a sale evidenced by admissions when there was an unregistered deed of sale which should have been registered under Act XX of 1866, the word "instrument" in section 49 being used on the understanding that the writing is not merely evidence of the transaction, but is the transaction itself.

Preference of Registered to Unregistered documents.

Instruments which create, declare, assign, &c. any right, title, or interest of a value *less than one hundred rupees* to or in immovable property *may* but must not be registered. Although unregistered, they will be admissible in evidence, and full force and effect will be given to them; but when they come into opposition with *registered documents*, whether of the same nature or not, affecting the same property, preference and prior effect are given to the latter (section 50, and see *Mansur Ali* v. *Amut Ali, &c.* 9 W. R. 282). This rule has, however, no application where the unregistered document is a decree or order of Court.[1] In the Registration Acts prior to III of 1877 the rule as to

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Sankara Ayyen, 7 Mad. H. C. Rep. 296: *Guduri Jaggannadham* v. *Rapaka Ramama, &c.* 7 Mad. H. C. Rep. 348: *Nilmadhab Singh Das and others* v. *Fatteh Chand Sahu*, 3 B. L. R. A. C. 310: *Sib Persad Das* v. *Annapúrna Dayi*, 3 B. L. R. A. C. 451: *Udai Chand Jana* v. *Nitei Mandal*, 9 W. R. 111: *Gopal Persad* v. *Nandarani*, 1 B. L. R. A. C. 192: *Batta Kristo Das* v. *Khetra Chandra Bhattacharjya*, 6 B. L. R. App. 69: *Eshri Rai and others* v. *Bindut Rai and others*, 4 N.-W.-P. Rep. 60: *Sita Kalwar* v. *Jagarnath Persad*, id. 170.

[1] The words "and not being a decree or order" in section 50 were first introduced in Act IX of 1871. As to the advantage of registering decrees or orders, however, see art. 179 of the second schedule of the new Limitation Act, XV of 1877, which allows *six* instead of *three* years for execution, when a certified copy of the decree or order has been registered.

registered instruments taking effect against unregistered instruments had no application to instruments, the registration of which was compulsory. The result was that, where property was mortgaged for Rs. 95 and afterwards sold for Rs. 300, it was held that the deed of sale, the registration of which was compulsory, could not take effect against the mortgage deed, the registration of which was optional, the rule having application only where the registration of both documents was optional (*Hamed Baksh* v. *Bindea Bun*, 2 N.-W.-P. Rep. 37: *Sheikh Riyasatúla* v. *Dúrga Charan Pal*, 15 B. L. R. 224; S. C. 24 W. R. 121). This anomaly has now been removed, and under the provisions of section 50 of Act III of 1877 (see *ante*, p. 425), the rule applies to both classes of documents.[1] These provisions of the law will not be allowed to subserve fraud. "I am ready to admit," said Peacock, C. J., in *Sheikh Rahmatúla* v. *Sheikh Sariatúla Kagchi* (1. B. L. R. F. B. 82), "that under section 50 of the Registration Act, the word "instrument"[2] refers to an honest *bonâ fide* instrument, and does not include a fraudulent one. If a man should get a fraudulent deed registered before an honest one, he could not, under section 50, rely upon that document as an instrument. It is a well-recognized maxim of law that no man can gain title by fraud. Under the Act relating to the registration of deeds and relating to lands in Middlesex, it was held that a subsequent registered deed has no priority over an unregistered one, if the man, who held under the registered deed, knew of the sale to the holder of the unregistered deed. But that was on the principle that a person is not to benefit, if he purchases with notice of a prior *bonâ fide* sale."[3]

Fraud.

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[1] The following are other cases on the subject of the preference of registered over unregistered instruments:—*Gayaram Mazimdar* v. *Madhú Súdhan Mazimdar*, 4 B. L. B. Appen. 73: *Imrit Singh* v. *Kailas Kunwar*, 11 W. R. 559 (deed of sale registered under Act XX of 1866 not preferred to unregistered deed executed before this Act came into operation, when registration was not necessary): *Makandas Kalidas, &c.* v. *Shankardas Haribhai*, 12 Bom. H. C. Rep. 241: *Lakhmichand Walchand* v. *Kastur Bechar*, 9 Bom. H. C. Rep. 60 (registered sale-certificate held not to take effect against a prior unregistered deed of sale): *Khandu Dubladas* v. *Tarachand Amarchand*, I. L. R. 1 Bom. 574 (mortgage deed registered under Act XX of 1866 not allowed to prevail against previous mortgage deed which might have been, but was not, registered under Act XIX of 1843).

[2] "Document" has been substituted for "instrument" in the present Act.

[3] On the subject of fraud the following cases may be consulted:—*Dulkhai Mir* v. *Nasir*, 20 W. R. 410: *Muhammed Ashraf* v. *Karimudin, &c.* 24 W. R. 468 (*bonâ fide* purchaser for valuable consideration from unregistered mortgagee preferred to registered vendee): *Gauri Kant Rai* v. *Giridhar Rai*, 4 B. L. R. A. C. 9: *Kamizudin Haldar* v. *Rajjab Ali Saha and others*, 9 W. R.-Civ. Rul. 528: *Mir Hetabudin* v. *Chaudhri Abdúl Sattar and others*, 5 R. C. & C. R. 197; S. C. 9 W. R. 351: *Bhikdari Singh* v. *Kanhaya Lal*, 14 W. R. 24: *Ram Chand Kumar* v. *Madhu*

Other cases connected with registration.

The following cases connected with the subject of the registration of documents may be usefully consulted :—*Padú Malhári, &c.* v. *Rakhmai*, 10 Bom. H. C. Rep. 435 (certificate of sale under the Code of Civil Procedure held to be an instrument requiring registration under section 17 of Act XX of 1866): *Máháddji* v. *Vyankaji Gobind*, I. L. R. 1 Bom. 197 (deed of satisfaction given by first mortgagee to mortgagor and second mortgagee held to require registration): *Jai Ram Gosain Bhattacharjya* v. *Kali Narain Rai*, 20 W. R. 291 (intention of the parties to be looked at in order to see whether instrument creates a charge on immovable property): *Sheikh Gaganfar Ali, &c.* v. *Mahomed Yasín, &c.* 20 W. R. 334 (document acknowledging the repayment of money advanced upon a mortgage held not to require registration): *Darshan Singh, &c.* v. *Hanwanta*, I. L. R. 1 All. 274 (a bond, which charged immovable property with the payment on a day specified therein of Rs. 99 principal, and Rs. 6 interest thereon, held to require registration): *Dwarkanath Mittra* v. *S. M. Sarat Kumári Dasi*, 7 B. L. R. 55; and on appeal, 20 W. R. 150 (letter depositing title-deeds and creating equitable mortgage held not to require registration): *Cowie and others* v. *Chatty and others*, 11 W. R. 520 (agreement to deposit deeds): *Ishan Chandra* v. *Sujan Bibi*, 7 B. L. R. 14 (instrument in form of lease, but creating an usufructuary mortgage not required to be registered): *Jalú Namdar* v. *Beicha Namdar*, 3 B. L. R. A. C. 394 (registered lease to take juice of date trees, *i. e.* for *movable* property, has no priority over a previous unregistered lease): *Winterscale* v. *Gopal Chandra Seal*, 3 B. L. R. O. C. 90 (agreement "for the use and hire of a steam engine, boiler, and machinery-sheds and a bungalow" is for *immovable* property, and must be registered): *Girish Chandra Rai Chaudhri* v. *Srimati Amina Khatun*, 3 B. L. R. Appen. 125 (objection as to inadmissibility for want of registration should be taken in Lower Court in order to be available in special appeal. The point was not however very directly decided in this case, and *Umatúl Fatima* v. *Ghunnú Singh* (19 W. R.

Sudhan Mazimdar, 7 W. R. Civ. Rul. 119: *Srinath Charan Das* v. *Dwarkanath Ghose*, 14 W. R. 318: *Prasanna Kumar Sandyal* v. *Mathuranath Banerji*, 8 B. L. R. Appen. 26 (suit to *set aside* a document the registration of which was obtained by improper means):—and still valuable although decided under the old law, *Srinath Bhattacharjya* v. *Ram Kamal Gangapadhya, &c.* 10 Moo. Ind. Ap. 220: *Nawáb Sidhi Nazar Ali Khan* v. *Ajodhya Ram Khan*, 10 Moo. Ind. Ap. 540: *Nitra Gopal Chandra* v. *Dwarkanath Mullick*, 1 W. R. Civ. Rul. 314: *G. Narasanna* v. *R. Gavappa*, 3 Mad. H. C. Rep. 270: *Srinath Bhattacharjya* v. *Ram Kamal Gangapadhya, &c.* 10 Moo. Ind. Ap. 220 (Act XIX of 1843).

✕ Act III of 1877 requires the registration of such a lease if it contains merely a an agreement to do so — Bengal Bldg Corp Ltr. Ma 24 R 10 Cal

23) is a direct authority to the contrary, it being there substantially held that a Court is bound to notice the fact of non-registration, whether the parties raise any objection on this head or not): *Ram Saran Das* v. *Ram Chand*, 1 N.-W.-P. Rep. 283 (document executed before Registration Acts, and which might have been registered thereunder admissible though not registered): *Chatardhari Misser* v. *Narsingh Dutt Sukal and others*, 4 N.-W.-P. Rep. 371 (to the same effect and no preference over such instrument): *Prahlad Misser* v. *Adit Narain Singh*, 1 B. L. R. A. C. 197, and *Sitkal Persad and another* v. *Babú Har Chand Sahú*, 1 N.-W.-P. Rep. 263 (priority of purchaser at sale in satisfaction of registered mortgage): *Majid Hosen* v. *Jeawan Khewat*, 4 N.-W.-P. Rep. 233 (registered counterpart of lease admissible, although lease itself unregistered): *Prabharam Hazra* v. *T. M. Robinson*, 3 B. L. R. Appen. 49 (no stipulation to register necessary where registration is by law compulsory): *Ram Kumar Mandal and others* v. *Brajahári Mirdha*, 2 B. L. R. A. C. 75 (lease without term but reserving an annual rent must be registered—see now clause (*d*) section 17, which is in conformity with this case): *Radhika Persad Chandra* v. *Ram Sundar Kar*, 1 B. L. R. A. C. 7 (covenant in one year's lease for renewal does not render registration compulsory): *Shama Charan Neogi* v. *Nabin Chandra Dhoba*, 6 B. L. R. Appen. 1 (agreement to convey cannot operate as a conveyance unless registered).[1]

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—OF THE BURDEN OF PROOF.

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101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the exist-

Burden of proof.

[1] As to the priority of registered instruments under the old law, the following cases are important:—*Maharaja Mahesur Baksh Singh* v. *Bhika Chaudhri and another*, 1 Jur. N. S. 122; S. C. 5 W. R. Civ. Rul. 61 (registered deed-of-sale held not to invalidate prior mortgage-deed though unregistered): *Syud Farzand Ali* v. *Syud Abdur Rahim*, 4 W. R. Civ. Rul. 30—see also *Krishnasami Pillai* v. *Venkata Chella Aiyan*, 3 Mad. H. C. Rep. 89 (preference given to registered instrument notwithstanding notice of previous unregistered conveyance): *Syud Nazar Ali* v. *Syud Imdad Ali*, 1 W. R. Civ. Rul. 206 (registered prevailed over unregistered instrument, both being *bonâ fide*): *Kailas Chandra Chatterji* v. *Gopal Chandra Chatterji*, 1 W. R. Civ. Rul. 78 (preference of registered instrument to previous verbal contract): *Hirachand Babaji* v. *Bhaskar Ababhat Shende*, 2 Bom. H. C. Rep. 207.

ence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.

Illustrations.

(*a.*) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(*b.*) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom burden of proof lies

Illustrations.

(*a.*) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b.*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

[English text-writers lay it down as one of the rules which govern the production of evidence that *the burden of proof lies on the party who substantially asserts the affirmative of the issue.* In applying this rule, the substance and effect of the issue and not merely its grammatical form must be considered. For example, in an action for *not* keeping a house in repair according to a covenant in the lease, or

Rule how stated by English text-writers.

for *not* executing a contract in a workmanlike manner, the negative allegation contained in the case set up by the plaintiff must be proved, if denied by the defendant. In order to the right application of the rule, the two following *tests* are usually employed :—*first*, consider which party would succeed if no evidence were given on either side: *secondly*, examine what would be the effect of striking out of the record the allegation to be proved. The *onus probandi* or burden of proof will lie on the party who would fail, if either of these steps were pursued. The first of these tests has been adopted in the above section of the Evidence Act. The other may, however, be usefully borne in mind, as there are some cases in which its application will be of material assistance. The two tests do not lead to different results ; but the desired analysis will in some cases be more readily effected by one than by the other.

Examples taken from decided cases.

The application of the rule may advantageously be illustrated by examples taken from cases actually decided in India. Where the plaintiff sued upon a bond which recited the payment of the *consideration*, and the defendant admitted the execution of the bond, but denied the receipt of the consideration, it was held that it lay upon the defendant to show that the recital in the bond as to the payment of consideration was not correct (*Fallí Bibí* v. *Basirudí Midha*, 4 B. L. R. 56 (Full Bench) : *Chaudhrí Debí Persad* v. *Chaudhrí Daulat Singh*, 3 Moo. Ind. Ap. 347 : *Saheb Perladh Sein* v. *Babú Badhú Singh*, 12 Moo. Ind. Ap. 275 : *Nawab Syud Ali Shah* v. *Mussamat Amani Begum*, 19 W. R. 149 : *Maniklal Babú* v. *Ram Das Mazimdar*, 1 B. L. R. A. C. 92 : *Jagat Chandra Chaudhrí* v. *Bhagwan Chandra Fatehdar*, 1 Marsh. Rep. 27 : *Ragunath Dass* v. *Lachmí Narain Singh*, 10 W. R. 407). The following cases are no longer law :—*Mussamat Jhalú* v. *Sheikh Farzand Alí*, 5 W. R. Civ. Rul. 203 : *Tekait Rúp Mangal* v. *Anand Rai*, 3 W. R. Civ. Rul. 111 : *Babú Ghansam Singh* v. *Chakauri Singh*, W. R. Jan.—July, 1864, 197). Where the plaintiff sued to set aside an usufructuary mortgage-deed perfected by possession, and alleged that this deed was executed to secure the amount of a previous indemnity-bond in favour of the mortgagees and for other purposes, that the conditions of this bond had not been complied with, and that therefore there was no sufficient consideration, it was held that it lay upon the plaintiff to make out the case alleged by him and to establish at least a good *primâ facie* title to the relief prayed for, so as to cast on the defendants the burden of proving the consideration for the deed : and in the absence of clear and consistent evidence to prove the plaintiff's case the deed was sustained. It was observed that the

proposition, that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying upon the instrument the burden of proving payment of that consideration, is too wide: and that a party, who comes into Court to enforce a bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance (*Kali Persad Tewari* v. *Raja Sahib Prahlad Sen*, 12 Moo. Ind. Ap. 282; S. C. 2 B. L. R. P. C. 122. Where a Hindú family is admitted or is shown to have been originally joint or living in a state of coparcenary: the presumption is that this state of union continues,[1] and that the ancestral property remains joint; and this well-established presumption of Hindú law can only be rebutted by showing that the family has been divided, and that the property has by partition or otherwise become separate, the burden of proving which facts lies on the party asserting them (*Massamat Chitha* v. *Babú Mihín Lal*, 11 Moo. Ind. Ap. 380: *Ram Chandra Dutt* v. *Chandra Kúmar Mandal and others*, 13 Moo. Ind. Ap. 181: *Pran Kissen Paul Chaudhri* v. *Mathura Mohan Paul Chaudhri*, 10 Moo. Ind. Ap. 403: *Kattama Nautchiar* v. *The Raja of Shivaganga*, 9 Moo. Ind. Ap. 539: *Bhagobati Misrain, &c.* v. *Doman Misser, &c* 24 W. R. 365: *Laximan Row Sadaseo* v. *Muller Row Baji*, Suth. Priv. Coun. Ap. 1: *Shiú Golam Singh* v. *Baran Singh*, 1 B. L. R. A. C. 164: *Amrit Nath Chaudhri* v. *Gauri Nath Chaudhri and others*, 6 B. L. R. 232 Priv. Coun.): *Bir Narain Sirkar* v. *Tinkauri Nandi*, 1 W. R. Civ. Rul. 316 (suit by a member of the family for a share of the joint property—plea that property was formerly joint, but that partition had taken place—burden of proving partition held to lie on defendant): *Bissambhar Sirkar* v. *Súradani Dasi*, 3 W. R. Civ. Rul. 21: *Manmohini Debi* v. *Súdhamani Debi*, id. 31: *Gúrú Persad Mukherji* v. *Kali Persad Mukherji*, 5 W. R. Civ. Rul. 121: *Trilochan Rai* v. *Raj Kissen Rai*, id. 214).

When partition is alleged among Hindús.

While a Hindú family remains joint, the presumption is that all the property, including acquisitions made in the name of a single member, is joint family property; and in consequence of this presumption, the burden of proof lies on a member of a Hindú family who claims any portion of the property as self-acquired (*Stri Rája Yanamala Venkayamah* v. *Stri Rája Yanamala Búchia Vankantara*, 13 Moo. Ind. Ap. 333:

[1] It may be said that joint-tenancy is presumed by law to be the primary state of every Hindú family—see 1 Strange's Hindú Law 225. *Appovier* v. *Ram Sobha Aiyan*, 11 Moo. Ind. Ap. 75: and *Nilkishto Deb Barmano* v. *Birchandra Thakur, &c.* 12 Moo. Ind. Ap. 540.

Ram Persad Tewari v. *Sheocharan Dass and others*, 10 Moo. Ind. Ap. 491 : *Lalla Behari Lalla and others* v. *Lalla Mahda Persad and others*, 6 W. R. Civ. Rul. 29 : *Sheo Rattan Kunwar* v. *Gaur Behari Bhakat and others*, 7 W. R. Civ. Rul. 449 : *Radharuman Kúndú and others* v. *Phúlkumari Bibi and others*, 10 W. R. Civ. Rul. 28. *Nilmani Bhúya* v. *Rájá Ganga Narain Sabar Rai*, 1 W. R. Civ. Rul. 334 : *Bipro Persad Myti* v. *Kena Dayi*, 5 W. R. Civ. Rul. 82 : *Ambika Charan Set* v. *Bhagabati Charan Set*, 3 W. R. Civ. Rul. 173 (suit for share in joint family property—denial that property was joint within period of limitation, and allegation of separation. Held that plaintiff must show joint enjoyment within the period of limitation, which having been done, it lay on defendant to prove the alleged separation) :[1] *Anand Mohan Rai and others* v. *Lamb and others*, Marsh. Rep. 169 : *Srimati Jadumani Dasi* v. *Gangadhar Seal*, 1 Boul. Rep. 600 : *Baini Singh and others* v. *Bharth Singh and others*, 1 N.-W.-P. Rep. 162 : *Nand Ram and others* v. *Chútú and others*, id. 255 : *Dabi Sahai and others* v. *Sheo Dass Rai*, id. 285 : *Gopi Kristo Gosain* v. *Ganga Persad Gosain*, 6 Moo. Ind. Ap. 53 : *Chand Hari Maiti* v. *Rájá Narendro Narain Rai*, 19 W. R. 231 : *Naronath Das Rai, &c.* v. *Goda Kolita*, 20 W. R. 343). Where there has been partition, the burden of proving re-union is on the party alleging it (*Rájá Suranani Venkata Gopala Narasimha Rai Bahadúr* v. *Rájá Suramani Lakshmi Venhama Rai*, 3 B. L. R. P. C. 41). So, if one of several brothers, who have separated in food and made a partition of estate, come into Court alleging that a particular portion of what was originally joint property has remained joint, notwithstanding the general partition, the burden of proof will lie on him (*Ram Gobind Kúnd and others* v. *Syud Hosen Alí and others*, 7 W. R. Civ. Rul. 90; and see *Mussamat Súbhahdar Dasi* v. *Boloram Rewan*, W. R. Special No. 57, where the whole property was self-acquired and the burden of proof was held to lie on the person seeking a share and alleging the estate to be joint). A person claiming under a deed-of-gift from a Hindú widow, and alleging the property, the subject of such gift, to be the widow's *stridhan*, must prove this (*Srimati Chandra Mani Dasi* v. *Jai Kissen Sirkar*, 1 W. R. Civ. Rul. 107).

In cases of alienation by Hindú widow, &c.

When a Hindú widow mortgages or alienates property, which, in the ordinary course of things, would descend to the reversionary heirs on her death, it lies upon those who derive their title from her

[1] In *Gosain Das Kundu, &c.* v. *Siru Kumari Debi* (12 B. L. R. 219) it was laid down still more distinctly that a person suing for a share in joint family property must show, not only that the property is joint family property, but also that he has had possession of his share, or has received payments on account of it within twelve years.

to show that the alienation or mortgage was made for a purpose for which a Hindú widow is by Hindú law competent to charge the estate (*Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam*, 11 Moo. Ind. Ap. 619: *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 Moo. Ind. Ap. 529). In *Rao Kuran Singh* v. *Nawab Mahomed Feizali Khan*, (10 B. L. R. 12) their Lordships of the Privy Council said:—"In such a case whatever be the precise degree of proof required by those who rely upon the mortgage, there is no doubt that those, who take such a security from a person having only a limited power to grant it, are bound to show, *primâ facie* at least, that the money was raised for a legitimate purpose." A daughter, who takes her father's property on the death of the widow and in default of a son, is in respect of alienation in no better position than the widow (*Deo Persad* v. *Lajú Rai*, 20 W. R. 102). So, where the widow or other guardian of a Hindú minor alienates or charges the estate or any portion of it, the person relying upon this charge or alienation must show that there was a necessity therefor, or at least that he had good ground for supposing that the transaction was for the benefit of the minor (*Lalla Bansidhar* v. *Kúnwar Bindeseri Dutt Singh*, 10 Moo. Ind. Ap. 455: *Hanúman Persad Panday* v. *Mussamat Babúi Manraj Kunwari*, 6 Moo. Ind. Ap. 394: *Madhu Dyal Singh* v. *Galbar Singh and others*, 9 W. R. Civ. Rul. 511: and see *ante*, p. 323, and *Sheo Persad Singh, &c.* v. *Surjbansi Koer*, 24 W. R. 281). The power of the manager for an infant heir to charge the estate is, under the Hindú law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not to be affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. If such danger have arisen from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Where it is not shown that the lender has acted *malâ fide*, he will not be affected, although it be shown that with better management the estate might have been kept free from debt. The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his

charge; and under such circumstances he is not bound to see to the application of the money. Money to be secured on an estate being obtainable on easier terms than a loan which rests on mere personal security, the mere creation of a charge securing a proper debt is not to be viewed as mismanagement. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application; and a *bonâ fide* creditor, who has acted honestly and with due caution, ought not to suffer, should it turn out that he has himself been deceived. A lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate. If he prove, therefore, the circumstances of his own particular loan so as to show that he acted honestly, that he made due and proper inquiry, and that he had reasonable ground for believing that the transaction was for the benefit of the minor and his estate, he will sufficiently have discharged the burden cast upon him. Beyond this it is impossible to lay down any general and inflexible rule as to the person on whom should be placed the burden of proving that any particular alienation was *bonâ fide*. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent upon them (*Hanuman Persad Panday* v. *Mussamut Babúí Manraj Kunwarí*, 6 Moo. Ind. Ap. 419, 423. See also *Bazrang Sahai Singh* v. *Mantora Chaudhrain, &c.* 22 W. R. 119: *Rúp Narain Singh and others* v. *Gangadhar Persad Narain and others*, 9 W. R. Civ. Rul. 297: *Nand Kúmar Singh and others* v. *Ganga Persad Narain Singh*, 10 W. R. Civ. Rul. 94: *Lálú Singh and another* v. *Rajendra Saha*, 8 W. R. Civ. Rul. 364: *Mussamat Bhúram Koer and others* v. *Saheb Madí and others*, 6 W. R. Civ. Rul. 149: *Umacharan Banerjí* v. *Haradhan Mazímdar*, 1 W. R. Civ. Rul. 347: *Jagdel Narain Sahai* v. *Lalla Ram Prokash*, 2 W. R. Civ. Rul. 292: *Dagdú* v. *Kamble*, 2 Bom. Rep. 369: *Sarab Narain Chaudhrí, &c.* v. *Sheo Gobind Panday, &c.* 11 B. L. R. App. 29: *Mahomed Ashraf* v. *Brijessurí Dasi, &c.* 19 W. R. 426, (alienation of a portion of the estate by Hindú widow in order to make a pilgrimage to Gya to perform her husband's *sradh*, held proper): *Ranjit Ram Kulal* v. *Mahomed Wáris, &c.* 21 W. R. 49 (digging a tank not a legal necessity for alienation): *Mathúra Das* v. *Kanú Behari Singh, &c.* 21 W. R. 287 (suit by minor to set aside alienation by guardian—purchase-money had been applied to minor's benefit—held that minor should refund the purchase-money less the rents and profits

received by alienee): *Srímatí Srímatí* v. *Lakhí Narain Dutt*, *&c.* 22 W. R. 171: *Múlví Mahomed Shamsúl Húda*, *&c.* v. *Sheokram*, alias *Rai Dúrga Persad*, 22 W. R. 409). In *Adarmaní Deyí* v. *Chaudhrí Sib Narain Kur* (I. L. R. 3 Calc. 1) the plaintiff sued to recover possession of a *mauza*, which he alleged to be his ancestral property and to have been alienated by his father without legal necessity. The Mitakshara Law was held to govern the family. The lower Courts held the alienation not to be binding upon the plaintiff, because the defendant had failed to prove legal necessity for such alienation. Markby, J. said:—"Whatever may have been once thought in this Court, I do not think that after the decision of the Privy Council in *Girdhari Lal* v. *Kantú Lal*" (14 B. L. R. 187; S. C. L. R. 1 I. A. 334; S. C. 22 W. R. 59; see *ante*, p. 323), "it can be said that this is the right way of dealing with such a case. There was certainly at one time a disposition in this Court to treat the father as having no power whatever to bind his son by his disposition of the ancestral property of the family except in cases where the son was a minor, and there was a legal necessity to dispose of the property; putting therefore the father, as regards his minor son's interest in the property, in the same position as a guardian. The effect of this view of the position of the father under the Mitakshara Law, coupled with the decision of the Full Bench in the case of *Sadabart Prasad Sahu* v. *Fúlbash Koer*" (3 B. L. R. F. B. 31)," that no member of a Mitakshara family can dispose even of his own share, was practically to enable the son to set aside *in toto* all alienations of the family property made during his minority, unless the alienee could show that the alienation was one which was really necessary for the preservation of the interests of the family. But the Privy Council in the case *Girdhari Lal* v. *Kantú Lal* have taken an entirely different view of the position of the son under the Mitakshara Law. Proceeding upon a decision of the Sadr Díwaní Adálat, they have practically put the son in the same position with respect to debts contracted by his father, as if he had succeeded to the ancestral estate as heir upon the death of his father. They say—'It would be a pious duty to pay his father's debts; and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts.' And they infer from this that an alienation made to satisfy such debt of the father is binding on the son. Applying these principles to the present case, it appears to me that the true question for consideration is, not whether there was any legal necessity for the sale of this property, but whether the sale was to satisfy a debt which, if contracted by the father and left unpaid

by him, the son would under the Hindú law be under an obligation to discharge. If it was to satisfy such a debt that the property was sold, then I think, according to the Privy Council's decision, the sale is valid; and I think that decision also clearly shows that it is only in respect of debts contracted for an immoral purpose that the son can say that under the Hindu law he is not liable . . . . Upon the question of *onus* I have had more doubt. One would be inclined to think that the party alleging immorality was bound to prove it. Probably, however, the question of *onus* is one which must be determined according to the circumstances of each particular case. But I have no doubt whatever that, under the circumstances of this case, the *onus* ought to be placed upon the plaintiff. The transaction took place a very long time ago, and the plaintiff attained his majority seven or eight years before he took any steps to set this purchase aside. I think it would be a grievous injustice to allow him now to do this, unless he can show affirmatively that the transaction is one which the law renders void." In *Lekraj Rai* v. *Mahtab Chand, &c.* (14 Moo. Ind. Ap. 393; S. C. 10 B L. R. 42) A was the principal manager of S, a banker, and after the death of S, continued to manage the business, which was conducted in the name of the widow and L, the infant son of S. A adopted B, the infant son of his brother C, and by will appointed C and D guardians of his adopted son. S died in 1845, and C and D obtained a certificate under Act XX of 1841. In 1846 the widow of S, as guardian of her infant son L, sued C and D to recover from the estate of A, Rs. 1,76,152, which amount A was alleged to have misappropriated. After the case had partly proceeded, C and D compromised and paid Rs. 74,000. B came of age in 1861, and in 1863 sued L to recover the amount so paid, alleging that the suit of 1846 was fictitious, and that the compromise was fraudulent and collusive between his guardians and the widow of S. In the District Court and High Court B succeeded, but the Privy Council, placing the burden of proof on him, held that he had failed to prove the fraud and collusion alleged by him, and reversed the decree obtained in India. Their Lordships said:—"There is no allegation of fraud against the defendant, who at the time of the transaction, which is impeached, was a child ten years old. The plaintiff took upon himself the burden of establishing fraud and collusion on the part of the defendant's mother and his own guardians, one of whom was his natural father. It was contended that, inasmuch as the guardians were dealing with the property of an infant, it was incumbent on the defendant to show that such dealing was for the infant's benefit; and the case of *Hanuman Persad Panday* v. *Mussamat Babúi Manraj Kunwari*, followed by *Lalla Bansidhar* v. *Kunwar Bindeseri Dutt*

Singh, was referred to in *support of this proposition*. But it is to be observed that in the latter case fraud on the part of the guardian was clearly established, and that in the former the question turned on the power of guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the guardians, who were also administrators of the estate (having received a certificate in pursuance of Act XX of 1841), to pay all just debts of the testator . . . . . It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer, if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt, confirmed by a decree of a Court, were to be set aside after sixteen years without distinct proof of fraud . . . . . Their Lordships . . . are of opinion that the Judge of the Zillah Court fell into an error in point of law in assuming that the burden of proof of the debt lay upon the defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive lay upon the plaintiff."

Power of Sebait to alienate Dewuttur property. Burden of Proof.

The authority of the *sebait* of property dedicated to the worship of an idol (*dewuttur*) is analogous to that of the mánager of an infant heir as set forth in the above passage in the judgment in the case of *Hanúman Persad Panday* v. *Babúi Manráj Kunwari*. In *Prusanna Kumari Debi* v. *Golab Chand* (14 B. L. R. 458; S. C. L. R. 2 I. A. 145) the Privy Council said :—"But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion, competent for the *sebait* of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples, or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them . . . . . It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as sebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a

degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them. Assuming, then, that a sebait may incur debts or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained against a former sebait in respect of debts so incurred should be binding upon succeeding sebaits, who in fact form a continuing representation of the idol's property. If such debts and the judgments founded on them were not held to be thus binding on successors, the consequence would be that no sebait would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors, who had afforded it, by at once transferring the property to other sebaits." That the sebait of an idol's estate has the same right, or an analogous right to that of the manager of an infant heir was again laid down by the Privy Council in *Kunwar Durganath Rai* v. *Ram Chandra Sen* (L. R. 4 I. A. 63; S. C. I. L. R. 2 Calc. 341), where, as regards another point, it was observed that the burden of proof lies upon the person who alleges that property has been inalienably conferred upon an idol to sustain its worship; and that very strong and clear evidence of such an endowment ought to exist. See also, on the subject of alienation by a sebait, *Maharani Shibessari Debi* v. *Mathúranath Acharjya*, 13 Moo. Ind. Ap. 270; and *Jai Lal Tewari, &c.* v. *Gosain Bhúban Gír*, 21 W. R. 334.

When a person alleged that a certain zemindari was an indivisible raj, and that he was entitled to succeed to the whole, it was held that it lay on him to prove these allegations (*Girdhari Singh* v. *Kulahal Singh and others*, 11 Moo. Ind. Ap. 344). When a person sets up a family custom of inheritance, restrictive of the law of the land, it lies on him to prove such custom (*Natukhi Kúari* v. *Chaudhri Chintaman Singh*, 20 W. R. 247: *Hirbái* v. *Gorbái*, 12 Bom. H. C. Rep. 294: *Raja Mahendra Singh* v. *Jokha Singh, &c.* 19 W. R. 211: *Thakur Jit Nath Sahi Deo* v. *Loknath Sahi Deo*, 19 W. R. 239). Where it is sought to prevent the possession of the legal Hindu heir and to change the usual course of inheritance on the alleged ground of an adoption having been made, it lies upon the party setting up this title against the entrance of the legal heir to prove the adoption both as regards the power of the adoptor and also as regards the fact of the adoption if it be questioned (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. 159). This is a strong case, the heir being the plaintiff in a suit to recover possession, and having alleged fraud, of which no proof was given—see also *Takúrdin Tewari* v.

Nawab Syud Alí Hosen Khan, L. R. 1 I. A. 192 (here the suit was also to set aside certain deeds and the plaintiff produced *primâ facie* evidence to challenge them); and *Chaudhrí Padam Singh* v. *Koer Odey Singh*, 12 Moo. Ind. Ap. 350. Where the reversionary heir sued *in the lifetime of the widow* for a declaration that an adoption made by her was invalid, it was held that it lay on him to prove such invalidity (*Brojo Kishorí Dasí* v. *Srínath Bose*, 9 W. R. Civ. Rul. 463). So where the suit was brought, not for relief by obtaining possession of the property, but for a declaration of title, the Court being asked to declare an adoption, which had long taken place and been acted upon, to be fraudulent and false (*Gúrú Prosonno Singh* v. *Nil Madhab Singh, &c.* 21 W. R. 84). A Hindu widow sued her husband's uterine brother for her husband's share. Held that the burden of proof was on the brother, who pleaded that deceased was a *leper* and not entitled to inherit (*Nalit Chandra Gúhú* v. *Bagola Sundari Dasi*, 21 W. R. 249). See also *Sakúmat Bibí, &c.* v. *Sheikh Waris Alí, &c.* 22 W. R. 400, where a wasiyatnama or will was set up in answer to a claim for a share by inheritance. When the Government claims as an escheat lands admittedly in the possession of the party claiming as heir, the burden of proof is on the Government to show that the last proprietor died without heirs (*Giridhárí Lal Rai* v. *The Government of Bengal*, 12 Moo. Ind. Ap. 448; S. C. 1 B. L. R. P. C. 44). When a person relies on a local usage regulating the right to land, the subject of alluvion or diluvion (see s. 2, Ben. Reg. XI of 1825), the burden of proving such local usage lies upon him (*Rai Manich Chand* v. *Madharan and others*, 13 Moo. Ind. Ap. 1). A purchased a *talúk* at a sale in execution of a decree obtained by a judgment-creditor. The assignee of another judgment-creditor, who had obtained a decree in a separate suit against the property, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not *bonâ fide*, being made in collusion with the judgment-debtors and *benamí* for them. It was held that the burden of proof lay on the plaintiff to establish the affirmative issue that the money for the purchase of the *talúk* was supplied by the judgment-debtors, or a third party for them, and not by the purchaser (*Srimanchandra Deo* v. *Gopal Chandra Chakravartti*, 11 Moo. Ind. Ap. 28: and see *Rúp Ram Das* v. *Sasiram Nath Karmokar*, 23 W. R. 141; and *Feiz Baksh Chaudhrí* v. *Fakirúdin Mahomed Ahasan Chaudhri*, 14 Moo. Ind. Ap. 234). As to the burden of proof in cases of alleged *benamí* purchases, the following cases may also be consulted:—*Bindú Basiní Debí* v. *Piyarí Mohan Bose and others*, 6 W. R. Civ. Rul. 312: *Rajah Chandranath Rai* v. *Ramjai Mazímdar* (Privy Council),

6 B. L. R. 304: *Munshí Bazlúr Rahím* v. *Shamsúnissa Begam and Jadonath Bose* v. *Shamsúnissa*, 11 Moo. Ind. Ap. 602 (the habit of holding land *benamí* is inveterate in India, but that does not justify the Courts in making every presumption against apparent ownership): *Deo Nath and another* v. *Pír Khan and Ramzan Khan*, 4 N.-W.-P. Rep. 16 (the burden of proof is on the person who maintains that the apparent state of things is not the real state of things): *Laikat Alí and others* v. *The Court of Wards*, 10 W. R. Civ. Rul. 423.

Two Classes of *Lakheraj* Grants.

Proprietors of land in the Bengal Presidency are concerned with two classes of *lakheraj* or revenue-free grants of land, *viz.*:—I—Grants *made previous to the 1st December, 1790, and not exceeding one hundred bighas*, the revenue of which (when adjudged invalid) was, by Sec. 6, Ben. Reg. XIX of 1793 made over to the persons responsible for the discharge of the revenue of the estate within the limits of which the lands are situate. The gift of this revenue was an act of liberality on the part of Government, inasmuch as these grants had been expressly excluded from the decennial and permanent settlements. The former *lakheraj*-holder was not dispossessed, but was allowed to hold the land as a dependent *talúk*, subject to the payment of revenue. II—Grants *made after the 1st December, 1790, and whether exceeding or under one hundred bighas.* These grants (unless made by the Governor-General in Council) were declared to be in all cases null and void, and, as they had been included within the limits of permanently-settled estates, the proprietors of such estates were, by Sec. 10 of Ben. Reg. XIX of 1793, authorized and required to *dispossess* the alleged grantees, annex the lands to their estates, and collect the rents thereof. With respect to the *first class*, proprietors were expressly required by law (Section 11, Reg. XIX of 1793) to institute suits in the Civil Courts for the recovery of the revenue made over to them by Government. With respect to the *second class*, proprietors were formerly allowed to dispossess the alleged revenue-free holders, but the difficulty of doing so induced resort to the Courts in these cases also; and finally this resort was made compulsory (section 28 of Act X of 1859). There is, however, an important difference as respects the burden of proof in each class of cases. In the first class, or where the allegation is that the *lakheraj* tenure was created before the 1st December, 1790, the burden of proof is on the alleged *lakherajdar* or person setting up the revenue-free title (*Umesh Chandra Rai* v. *Dakhina Sundarí Debya and others*, W. R. Special No. 95 (suit for resumption): *Rajà Rádhá*

Burden of Proof in the First Class of Cases.

Krishna Singh v. *Radhá Mangí*, Sev. Aug.—Dec. 1863, 366 (suit for resumption): *Lalla Sibkal and others* v. *Sheikh Golam Nabi and others*, Marsh. Rep. 255 (purchaser of *lakheraj* tenure at sale in execution): and see clause 3, section 3, Ben. Reg. XIV of 1825.

In the second class of cases, on the other hand, or when the allegation is that the *lakheraj* tenure was created *after the 1st December*, 1790, the burden of proof is on the zemindar or proprietor to show that the land claimed as *lakheraj* is part of his *mâl* or *rent-paying* estate, and was assessed with the public revenue at the time of the Decennial Settlement—*Parbati Charan Mukhapadhyay* v. *Raj Krishno Mukhapadhyay*, B. L. R. Sup. Vol. F. B. 165: *Harihar Mukhapadhyay* v. *Madhab Chandra, &c.* and *Nabakrishna Mukhapadhyay* v. *Kailas Chandra Bhattacharjya*, 14 Moo. Ind. Ap. 152; S. C. 8 B. L. R. 566: *Mahomed Aktur, &c.* v. *G. M. Reily*, 24 W. R. 447: *Arfanissa* v. *Piyari Mohan Mukherji*, I. L. R. 1 Calc. 378 (here it was held that a purchaser at a sale for arrears of Government revenue is in no better position than any other proprietor). This is generally done by showing that rent has been paid for the land in question at some period subsequent to 1790—*Khetal Chandra Ghose* v. *Púrna Chandra Rai, &c.* 2 W. R. Civ. Rul. 258: *Behari Lal Rai* v. *Kali Das Chandra*, 8 W. R. Civ. Rul. 451: *Bishnath Chaudhri* v. *Radha Charan Gangúli*, 20 W. R. 465 (here it was also remarked that the mere fact of land falling within the geographical limits of an estate does not of itself show that such land is *mâl* land).[1]

Burden of Proof in Second Class of Cases.

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[1] See the following cases:—*Hera Lal Seal* v. *Petambar Mandal*, Sev. Aug.—Dec. 1863, 171: *Babú Mahabir Persad* v. *Babú Amrao Singh*, 1 N.-W.-P. Rep.-Civ. Rul. 167 (case by a zemindar under section 28, Act X of 1859): *Babú Parsidh Narain Singh* v. *Bissessir Dyal Singh*, 7 W. R. Civ. Rul. 148 (suit by zemindar to obtain a declaration that land, sold in execution as *lakheraj*, was his *mâl* land): *Tarini Persad Ghose* v. *Kalicharan Ghose and others*, Marsh. Rep. 215 (suit to recover possession of 93 *bigahs* of land held as *lakheraj*, but asserted by plaintiffs to belong to their rent-paying villages): *Harihar Mukherji* v. *Abbas Ali Khan and others*, Sev. Rep. Aug.—Dec. 1863, 875: *Rájá Syud Ahmed Reza* v. *Rájá Inayat Hossen*, 1 W. R. Civ. Rul. 330: *Gumani Kazi* v. *Harihar Mukherji* (Full Bench), W. R. Special No. 115, and Marsh. Rep. 523 (suit for enhancement of rent—defence that part of the land was *lakheraj*): *Moti Lal Adack and others* v. *Jadopati Das*, 2 W. R. Act X Rul. 44 (similar to last case): *Bissessur Chakravartti and others* v. *Umacharan Rai*, 7 W. R. Civ. Rul. 44 (similar): *Mirtanjai Chakravartti* v. *Rájá Baradakant Rai*, 2 R. C. & C. R. Rent Rul. 21 (similar): *Kristo Mohan Patar* v. *Hari Shankar Mukhapadhya*, 3 R. C. & C. R. Rent. Rul. 43 (difficulty of zemindar's discharging the burden of proof, when the plea of

Where, however, the alleged *lakherajdar* comes into Court as plaintiff to obtain a decree declaratory of his *lakheraj* title, the burden of proof is on him to prove this title, and no proof of possession for years, unless carried back previous to 1790, will shift the burden to the zemindar (*Ram Jiban Chakravartti* v. *Persad Shar and others*, 7 W. R. Civ. Rul. 458). This case must be distinguished from *Man Mohini Dasi and others* v. *Jaikissen Mukherji and others* (W. R. Special No. 174), in which the zemindar had ousted the alleged *lakherajdar* without resorting to the Courts; and, when the latter brought his action to recover possession, it was held that the burden of proving the land to be *mâl* or rent-paying lay on the zemindar. To have decided otherwise would have been to allow the

Suit by *Lakherajdar*.

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lakheraj in answer to a suit for enhancement relates to a small portion of the land only): *Guru Persad Rai and others* v. *Jagobandu Mazimdar, &c.* W. R. Special No. 15 (this was a suit for a *kabuliyat*, and a Full Bench held that, the tenant having admitted that plaintiff was his landlord for a portion of the land, this was sufficient *primâ facie* evidence of his being plaintiff's raiyat to throw upon him the burden of proving his special plea of *lakheraj* as to the remainder. "Otherwise," it was said, "every raiyat might meet every rent case by a false plea of proprietary title"): *Nehal Chandra Mistari* v. *Harî Persad Mandal*, 8 W. R. Civ. Rul. 183 (suit for enhancement of rent—plea and *primâ facie* evidence that part of the land was *lakheraj*): *Sib Narain Rai* v. *Chidam Das Beiragi and others*, 6 W. R. Act X Rul. 45: *Ram Kumar Ghosal* v. *Debi Persad Chatterji*, 6 W. R. Act X Rul. 87: *Dhan Mani Debya* v. *Satargan Seal and others*, id. 100: *Gangadhar Singh* v. *Bimola Dasi*, 5 W. R. Act X Rul. 37: *Muhammed Azsar Ali* v. *Nasir Mahomed and others*, 3 B. L. R. A. C. 304 (plea that all the *mâl* land had been relinquished, and that residue was *lakheraj*): *Sridhar Nandi* v. *Braja Nath Kundu Chaudhri and others*, 2 B. L. R. A. C. 211 (similar to last case, defendant-raiyat should give some *primâ facie* evidence that land is really *lakheraj*): *Matangini Debya* v. *Mahomed*, alias *Buri Meea*, Suth. Rep. Jan.—July, 1864, Rent. Rul. 30: *Babu Rajkissen Mukherji and others* v. *Babu Jaikissen Mukherji and others*, id. 119: *Hera Ram Bhattacharjya* v. *Ashraf Ali*, 9 W. R. Civ. Rul. 103: *Prodhan Gopal Singh and others* v. *Bhup Rai Ojha and others*, 9 W. R. Civ. Rul. 570: *Mati Lal* v. *Janaki Rai*, 5 N.-W.-P. Rep. 364: *Maharaja Ramnath Singh Bahadur* v. *Haro Lal Panday and others*, 8 W. R. Civ. Rul. 188 (suit for a *kabuliyat*). If the defendant-raiyat plead that part of the land is *lakheraj*, but do not point out what part, the plaintiff cannot be called upon to discharge the burden of proof until he do so (*Rajá Satta Charan Ghosal* v. *Tarini Charan Ghose*, 3 W. R. Civ. Rul. 178). A similar rule has been applied to *chaukidári chakeran* land, and long possession has been held to throw upon the zemindar the burden of proving that the lands in suit were the private lands of the zemindar, and were not set apart at the Decennial Settlement as *chaukidari chakaran* (*Mukta Keshi Debi Chaudhrain* v. *The Collector of Murshedabad*, 4 W. R. Civ. Rul. 30; see also *Forbes* v. *Mir Mahomed Taki*, 13 Moo. Ind. Ap. 438).

zemindar by his own wrongful act to shift the burden of proof.[1] Under section 87 of the North-Western Provinces Land Revenue Act, XIX of 1873, any person claiming land free of revenue, not recorded as revenue-free, is bound to prove his title to hold such land free of revenue.

Suits for Enhancement of Rent.

When a landlord sues his tenant for enhancement of the rent previously paid by him, the burden of proof is on the landlord to establish the ground (see section 17, Act X of 1859, and section 18, Act VIII (B. C.) of 1869), on which he alleges that he is entitled to such enhanced rent—*Púlin Beharí Sen* v. *Watson and Co.*, 9 W. R. Civ. Rul. 190 (allegation that productiveness of the soil had been increased otherwise than by the agency or at the expense of the raiyat): *Rajkrishna Mú-kherjí* v. *Kalí Charan Dhobain and others*, 6 B. L. R. App. 122 (allegation that produce and productive powers of land have increased otherwise than by the agency or at the expense of the raiyat): *Golam Alí* v. *Gopal Lal Thakur*, 9 W. R. Civ. Rul. 65 (excess area—increase of productiveness of soil and of value of the produce): *James Hills* v. *Jender Mandal*, 1 W. R. Civ. Rul. 3. If, however, the defendant *raiyat*, without objecting to the enhanced rate of rent claimed, plead that the increase in the productiveness of the soil is due to his agency, the burden of proof will lie on him to show that such is the case (*Nabin Kissen Bose* v. *Shafatúlah*, 1 W. R. Civ. Rul. 24). When the defendant *raiyat* denied his liability to enhancement on the ground that he held a *muharrarí pattá*, the burden of proving this *pattá* was held to lie on him (*Prannath Rai Chaudhrí* v. *Mohihúdín Ahmed*, 6 W. R. Act X Ruf. 39): and where he pleaded, that rent was assessed on land covered by hedges and ditches, and forming the boundaries between fields, which land was, according to custom, exempt from rent, it was held that the burden of proving such custom lay on him (*Karú Chaudhrí and another* v. *Jaiyessir Nandí*, 6 W. R. Act X Rul. 46). When a *raiyat*, on whom a notice of enhancement has been served, takes the initiative and brings a suit to contest the grounds of enhancement set forth in the

[1] See also *Budha Mudha and others* v. *Sheikh Kheirat Ali and others*, 5 W. R. Civ. Rul. 269: *Raja Pertab Chandra Singh* v. *Sib Das Kayat and others*, 1 W. R. Civ. Rul. 111: *Jaikissen Mukherji* v. *Piyari Mohan Dutt and others*, 8 W. R. Civ. Rul. 160: *Sheikh Goberdhan and others* v. *Sheikh Tafail and others*, 6 W. R. Civ. Rul. 190: *Raja Pertab Chandra Singh* v. *Sib Das Kayat*, 1 W. R. Civ. Rul. 111: *Ram Lal Das* v. *Utam Charan Das*, Sev. Aug.—Dec. 1863, 704: *Srimati Uma Sundari Thakurani* v. *Kishori Mohun Banerji and others*, 8 W. R. Civ. Rul. 238. For further information on the subject of *lakheraj* tenure see the Author's edition of the *Bengal Regulations*, pp. 36, 245-261.

notice, the burden of proof will lie on him (*Prithi Ram Chaudhri Rai Bahádur* v. *Chidam Chandra Saha*, 8 W. R. Civ. Rul. 8: *Ganga Narain Chaudhri* v. *Kofa Pali*, 11 W. R. Civ. Rul. 377: but see *Dinonath Bose Malik* v. *Jageshir Mandal*, 1 W. R. Civ. Rul. 154). When a *talúk* was shown to have been in existence and so *capable* of *being registered* at the time of the Decennial Settlement, this was held to be sufficient to throw upon the plaintiff landlord, seeking to enhance the rent, the burden of showing that the *talúk* had been held at a variable rent (*Radhika Chaudhrain and others* v. *Bamasundari Dasi*, 4 B. L. R. P. C. 8, and see section 51, Bengal Reg. VIII of 1793). When in answer to a suit for enhanced rent it is pleaded that the rent has not been changed since the time of the Permanent Settlement, and is therefore not liable to enhancement (see sections 3, 4, 15, and 16 of Act X of 1859, and sections 3, 4, 16, and 17 of Act VIII (B. C.) of 1869), it lies upon the party seeking the benefit of the *twenty years'* presumption to prove that the rent has not been varied for twenty years before suit; and, when he has discharged this burden of proof, it lies upon the landlord to show that the rent has varied since the Permanent Settlement (*Rasmani Debya* v. *Haronath Rai*, 1 W. R. Civ. Rul. 280).

Abatement of Rent.

When the defendant in a suit for arrears of rent claims abatement for a portion of the land said to have been diluviated, the burden of proving the diluvion is on him (*Thomas Savi* v. *Obhai Nath Bose*, 2 W. R. Act X Rul. 27). So when the defendant in a suit for arrears of rent alleges remission, it lies on him to prove such remission (*Banwari Lal* v. *J. Furlong*, 9 W. R. Civ. Rul. 239).

Fraud.

It is a general rule that fraud cannot be presumed, and that the burden of proving that any transaction has been effected by fraud and misrepresentation lies upon the person seeking to impeach its validity on these grounds (*Rajendra Narain Rai and another* v. *Bejai Gobind Sing*, 2 Moo. Ind. Ap. 181: *Achanth Singh and others* v. *Kissen Persad Singh and others*, W. R. Jan.—July, 1864, 37: *Mussamat Sahúdar Koer* v. *Jai Narain Singh*, 1 W. R. Civ. Rul. 326: *Anand Mayi Debya* v. *Sibdyal Banwari*, 2 W. R. Civ. Rul 2: *Girish Chandra Chatterji and another* v. *Mohesh Chandra Nyalanhar*, 10 W. R. Civ. Rul. 173: *Ram Gati and others* v. *Mumtaj Bibi and others*, 10 W. R. Civ. Rul. 280: *Lalla Rudra Persad* v. *Binod Ram Sen and others*, 10 W. R. Civ. Rul. 321). So the burden of proof lies upon a person who alleges that an instrument was obtained by duress, intimidation, &c. (*Motilal Upadhya* v. *Jagarnath Gurg*, 1 Moo. Ind. Ap. 1;

Rani Parvatha Vardhay Nauchiar v. *Jayavera Ramakamera Ettyapa Naicker*, 7 Moo. Ind. Ap. 441). The observations of their Lordships of the Privy Council in the case of *Jodonath Bose* v. *Shamsúnissa Begam* (11 Moo. Ind. Ap. 602) may well be borne in mind in connection with this subject.—"The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are, perhaps, somewhat too apt to see fraud everywhere."

Disputed Boundary.

Where a plaintiff seeks to establish his right to land by setting aside an award made by Government officers on a revenue survey and by showing that the boundary laid down by such officers is erroneous, the burden of proof is on him and he must establish his allegations by independent evidence (*Rájá Lelanand Singh Bahadúr* v. *Maharajah Moheshur Singh Bahadúr and others*, 10 Moo. Ind. Ap. 81: *Rájá Lelanand Singh* v. *Rájá Mahendra Narain and another*, 13 Moo. Ind. Ap. 57). The Privy Council will not reverse the judgment of an Indian Court upon such a question of boundary, unless very clearly satisfied on the facts and evidence that the decision is wrong. In the latter of the two cases above quoted, it was said:—"The suit is brought not only for the recovery of the lands, but, as a necessary step towards that object, to set aside certain awards passed by the officers employed to conduct the Revenue Survey in this district, and to obtain a rectification of the boundary line as defined by them. . . . . Their Lordships need hardly observe that the plaintiff in such a case has to overcome the strong presumption which the decision of such a question as this by competent officers after full local inquiry made with the aid of a scientific survey of the locality is calculated to raise against him." In a case of disputed boundary between a *lakheraj* tenure and a zemindar's *mâl* land, there is no presumption in favour of either party, and it lies upon the plaintiff to prove the case set up by him (*Bír Chandra Júbraj* v. *Ram Gati Dutt and others*, 8 W. R. Civ. Rul. 209).

Limitation.

Where a plaintiff sues to recover possession of property and is met with the plea of limitation, the burden of proof is on him to show that he has been in possession at some time within the period of limitation, *i. e.* the period allowed by law after the cause of action has arisen for bringing a suit upon such cause of action (*Denobandhú Sahai* v. *J. Furlong*, 9 W. R. Civ. Rul. 155: *The Collector of Rungpore* v. *Prasanno Kúmar Takur*, 5 W. R. Civ. Rul. 115: *Jagadamba Chaudhrain and others* v. *Ramani Chandra Deo Bakshi and others*, 6 W. R. Civ. Rul. 327: *Kúnwar Nitrásur Singh* v. *Nand Lal*, 8 Moo. Ind. Ap. 199: *Bromanand Gosain* v. *The Government*, 5 W. R. Civ. Rul. 136: *Búli Singh and*

others v. *Harobans Narain Singh and others*, 7 W. R. Civ. Rul. 212: *Nazir Sidhi Najir Ali Khan* v. *Umesh Chandra Mitra*, 2 W. R. Civ. Rul 75: *Mirza Muhammed Hossein* v. *Sarahtanissa Khanum*, 2 W. R. Civ. Rul. 89: *Gúrú Dass Rai* v. *Haronath Rai*, 2 W. R. Civ. Rul. 246: *Ram Lochan Chaudhri* v. *Jai Dúrga Dasi and others*, 11 W. R. 283: *Gosain Das Kúndú, &c.* v. *Serú Kumari Debi*, 19 W. R. 192 (suit for share in joint family property): *Gokul Krishto Sen* v. *M. David*, 23 W. R. 443 (suit for possession of alluviated soil, said to have been re-formed on the original site).

In a suit for damages for malicious prosecution, it lies on the plaintiff to prove the existence of malice and of want of reasonable and probable cause, before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds (*Mahant Gaur Hari Das Adhikari* v. *Hayagrib Das Mohant*, 6 B. L. R. 371: *Dúngasi Byde* v. *Giridhári Mull Dúgar*, 10 W. R. 439). So, in a suit for damages for defamation of character, the plaintiff must start his case by showing that he was not guilty of the offence charged, before the defendant can be called upon to show that he made the imputation in good faith (*Mahendra Chandra Chakravartti* v. *Sarba Mohye Debya*, 11 W. R. Civ. Rul. 534). In cases of collision at sea the master and owners of the colliding vessel, even though compelled by law to take a pilot on board, are *primâ facie* liable for damage caused by their ship, and in seeking to exonerate themselves, the burden of proof is on them to show that the neglect which caused such damage was that of the *pilot* and solely his (*The ship* "*Glencoe*," 1 Boul. Rep. 105). Where a person sued on a Policy of Insurance, which contained certain exceptions in the event of which the assurers were not to be liable, it was held that it lay upon the plaintiff to prove that the loss did not fall within any of these exceptions (*Aga Syud Sadack* v. *Haji Jackariah Mahomed and others*, 2 Ind. Jur. N. S. 308). In the case of a contract to sow indigo, when it has not been sown according to the contract, not sowing is *primâ facie* evidence of dishonesty; and, if the benefit of clause 4, section 5 of Bengal Regulation XI of 1823 be claimed on the ground that failure to sow was owing to accident or to some cause not implying fraud or dishonesty, the burden of proof is on the person who claims such benefit (*Lal Mahomed Biswas* v. *Watson & Co.*, 1 Ind. Jur. 3). Where a person purchased at an execution sale a *tora Garas Hak*, or the right to a certain annual payment made by Government, and sued to have his name entered as the *payee* thereof in the Collector's books, it was held that it lay upon Government to show that this right was inalienable (*Sambhú Lal Girdhar Lal* v. *The Collector of Surat*,

Other cases.

8 Moo. Ind. Ap. 1). Lands situate within the limits of a *zemindarí* are *primâ facie* considered to be a part of such zemindarí: and those who allege that they are entitled to have any such lands settled as a separate *Shikmí talúk* must make out this title (*Wise and others* v. *Bhúban Mayí Debya and another*, 10 Moo. Ind. Ap. 165: and see *Nistariní* v. *Kalí Persad Das Chaudhrí, &c.* 23 W. R. 431). When one shareholder sues for a fractional portion of the entire rent, and it is pleaded that the entire rent is payable together, it lies on plaintiff to show that he is entitled to payment of his fractional portion separately (*Mussamat Lalan* v. *Hemraj Singh*, 20 W. R. 76). When the defendant-raiyat in a suit for rent pleads payment, the burden of proof is on him (*Pareag Lal* v. *Ram Jewan Lal*, 1 W. R. Civ. Rul. 264; *Kúndú Beharí Banerji* v. *Rai Múthúranath Chaudhrí*, 1 W. R. Civ. Rul. 155). A raiyat claiming protection from ejectment by a purchaser at a sale for arrears of Government revenue must prove the ground (section 37, Act XI of 1859) on which he claims such protection (*Doman Lal* v. *Padman Singh*, W. R. Jan.—July 1864, Act X Rul. 129). When a raiyat holds lands of considerable extent under a zemindar, and alleges that one or two plots are held under a different title, the burden of proving this allegation has been cast upon him (*Ram Kúmar Rai* v. *Bejai Gobind Baral and others*, 7 W. R. Civ. Rul. 535). In a suit by a kabulayatdar khot for rent of land in a khotí estate, the onus is not on the plaintiff to prove the land to be khotí, but on the holder of the land to show that he is exempted from paying rent according to the custom of the country (*Muhammad Yakcub* v. *Muhammad Ismail*, 9 Bom. H. C. R. 278). A plaintiff suing to set aside the sale of a *patní talúk* on the ground that the Collector acted without jurisdiction in making the sale must prove this allegation (*Kalí Kúmar Mukherji* v. *The Maharájá of Burdwan*, 5 W. R. Civ. Rul. 39).

When it is objected that the plaintiff had a cause of action and omitted to sue in a former suit for what he claims in a subsequent suit, the burden of proving this objection lies on the defendant who makes it (*Skinner & Co.* v. *Rani Shama Sundari*, 19 W. R. 430). The burden of proving that the summons was not served lies upon a person claiming the benefit of section 119 (now section 108) of the Code of Civil Procedure (*Sheikh Torab Ali and Chúraman Singh Chaudhrí*, 24 W. R. 262). When a claim was made by a third party under section 246 of the old Code of Civil Procedure to property attached in execution, the burden of proof was held to be on the claimant to show that the property was his or in his possession, and therefore not in the possession of the judgment-debtor (*Nga Tha Yah* v. *F. N. Burn*, 2 B. L. R. F. B. 91, overruling

Nito Kalí Debya v. *Kripanath Rai*, 8 W. R. Civ. Rul. 358). When a judgment-creditor has obtained a writ of attachment against the property of his judgment-debtor, but such debtor has no property against which the writ can be enforced, the judgment-creditor is entitled to an order for execution of his decree by attachment of the person of the debtor, and the burden of proof is on the latter to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, not on the creditor to show that by sending the debtor to prison some satisfaction of the debt will be obtained (*C. Seton and another* v. *A. S. Bijohn*, 8 B. L. R. A. C. 255). When a defendant asserts that a suit is overvalued, the burden of proving the truth of this assertion is on him (*Uma Sankar Rai Chaudhrí* v. *Syud Mansur Alí Khan Bahadúr*, 5 B. L. R. App. 6). When a person came into Court under section 230 of the old Code of Civil Procedure, alleging that he had been dispossessed, in the execution of a decree, of land or other immovable property which was *bonâ fide* in his possession on his own account or on account of some person other than the defendant, and that it was not included in the decree, or if included in the decree that he was no party to the suit in which such decree was passed, it was held that it lay on him to prove his possession; that he might, if he wished, give evidence of title beyond possession, but it was not absolutely necessary for him to do so in the first instance (*Radha Piyárí Debí Chaudhrain and others* v. *Nabin Chandra Chaudhrí* (Full Bench), 5 B. L. R. A. C. 708: *Brindaban Chandra Rai* v. *Tara Chand Bandapadhyay*, 11 B. L. R. 237: *Mussamat Yusan Khatun* v. *Ramnath Sen*, 7 B. L. R. App. 27: *Sharoda Mayí Chaudhrain* v. *Nabin Chandra Chaudhrí*, 11 W. R. 255: *Mahomed Ausar and others* v. *Prokash Chandra Saha*, 8 W. R. Civ. Rul. 8). The same rule as to the burden of proving possession will doubtless apply under the corresponding section (332) of the present Code, which enacts however that the Court shall confine itself to the grounds of dispute specified in the section. The burden of proving actual receipt and enjoyment of rent lies on the person intervening in a rent-suit under section 77, Act X of 1859 (*Kishen Chandra Dass* v. *Baratí Sheikh*, 2 W. R. Act X Rul. 36: *Ram Bharose Singh and others* v. *Jewa Mahatún*, 11 W. R. Civ. Rul. 319). In a suit to recover possession of certain property from plaintiff's vendor, who made no real defence to the suit, a third party came in and claimed the property and was made a defendant. The burden of proof as against the plaintiff was held to lie on such intervenor (*Jagadanand Misser* v. *Hamíd Rasúl and others*, 10 W. R. Civ. Rul. 52). When a debtor pleads tender of payment as a ground for not being charged with interest, it lies on him to prove such tender

(*Ráni Sharat Sundári Debya* v. *The Collector of Mymensingh*, 5 W. R. Act X Rul. 69). When a party complains in appeal of the rejection of evidence by a lower Court, he must be able to show that the evidence was tendered and rejected (*Mothi Lal Upadhyay* v. *Jagarnath Gurg*, 1 Moo. Ind. Ap. 1: *Modi Kaikhuscrow Harmasji* v. *Cúverbhai*, *&c.* 6 Moo. Ind. Ap. 448). The burden of proof lies upon a defendant who pleads that the plaintiff is a minor and therefore unable to sue (*Cheit Narain Singh* v. *Banwari Singh*, *&c.* 23 W. R. 395).

When a plaintiff comes into Court and asks for a declaratory decree confirming his title, he must prove the title which he seeks to have confirmed, and cannot have a decree on the mere ground that he is in possession and that the defendants have proved no better title (*Joloke Singh* v. *Gurwar Singh*, 2 W. R. Civ. Rul. 167: *Rassonada Rayar* v. *Sitharami Pillai*, 2 Mad. H. C. Rep. 171: *Royes Múlah and others* v. *Mudhú Súdhan Mandal*, 9 W. R. Civ. Rul. 154: *Parsid Narain Singh and others* v. *Bisseshar Dyal Singh and others*, 7 W. R. Civ. Rul. 148: *Madan Mohan Saha* v. *Bharat Chandra Rai*, 11 W. R. Civ. Rul. 249). Where plaintiff sued to obtain a declaration that a person, who had obtained in his favour an order of a Magistrate under section 320 (now section 530) of the Code of Criminal Procedure, was not entitled to a right of way over certain lands, it was held that it lay upon the plaintiff to prove that he was entitled to exclusive possession of the land (*Puchai Khan*, *&c.* v. *Abed Sirdar*, *&c.* 21 W. R. 140). In a suit brought by *zúr-i-peshgí* mortgagees for possession and to set aside a *mukarrarí* lease, which the defendant alleged to have been granted to him by the mortgagor before the mortgage, it was held that, having regard also to the fact that the *mukarraridars* were in possession under a Magistrate's order, it lay on the plaintiffs in the first instance to give some evidence to impeach the validity of the *mukarrarí* lease; but that, when they had made out a strong *primâ facie* case, the *onus* was shifted, and it was incumbent upon the *mukarraridars* to show by satisfactory evidence that the lease was really executed before the date of the mortgage, and that it was granted *bonâ fide* for a real consideration and was intended to be operative (*Shamnarain*, *&c.* v. *The Administrator-General of Bengal*, 23 W. R. 111). When the defendant impeaches the correctness of an Amín's report, the burden of proof is on him; and the plaintiff should not in the first instance be called upon to support its correctness (*Gauri Narain Mazimdar* v. *Madhú Súdhan Dutt*, 2 W. R. Act X Rul. 1). Where a person contends for a particular construction of a document which is not the *primâ facie* construction, and which is contrary to

Hindu law, and to the established custom of construing documents in the particular part of the country, the burden of proof lies on the person who contends that the contract should be governed not by general but by particular rules (*Maharájá Tej Chand* v. *Srikanth Ghose, &c.* 3 Moo. Ind. Ap. 261). In the case of *Rajá Kissen Dutt Ram Panday* v. *Narendar Bahadúr Singh* (L. R. 3 I. A. 85) a mortgagor sued for redemption. The mortgage-deed was lost and the question was whether the *onus* lay on him to prove that the term did not expire before a certain date, or upon the mortgagee to prove that it did. The Privy Council were of opinion that it lay upon the plaintiff to substantiate his case by some evidence, by some *primâ facie* evidence at least. "But in this as in most other cases," it was said, "when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *primâ facie* in this case in their Lordship's view is upon the plaintiff, still they think the consideration should not be omitted that the defendant would naturally have the mortgage-deed, and that it would be *primâ facie* at all events more in his power to give accurate evidence of its contents than in that of the plaintiff. It is not a case in which two deeds, such as a lease and a counterpart are executed, the plaintiff keeping one and the defendant the other, but it is a case in which it would appear that there was only one document, and that that would be, and was in this case, in the custody of the defendant. The plaintiff by the hypothesis would not have seen the document, or probably have had access to it from the time of its execution, whereas the defendant would be assumed to have it and to be able to produce it, or, if he could not produce it, to show why he could not, and to give some evidence of its contents if it were lost."]

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

(*a.*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

[The cases given in the *Note* to the preceding section will furnish numerous further illustrations of the rule here laid down. It may be observed that the general rule contained in section 102 applies more especially to the whole case, while the rule contained in section 103 will have special application to particular issues.

As instances of a provision of law that the proof of a fact shall lie upon a particular person, reference may be made to section 89 of the Code of Criminal Procedure, which enacts that all persons shall give information of the commission of certain offences to the nearest Police officer or Magistrate, and throws upon such persons the burden of proving *reasonable excuse* for not doing so—and to section 19 of the Indian Succession Act, under the provisions of which succession to the *movable property* of a man, who dies leaving such property in British India, is regulated by the law of British India in the absence of proof of any domicile elsewhere; the person who seeks to have the succession regulated by any other law being, therefore, under the burden of proving another domicile.]

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a.*) A wishes to prove a dying declaration by B. A must prove B's death.

(*b.*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(*a.*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(*b.*) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c.*) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section three hundred and twenty-five.

The burden of proving the circumstances, bringing the case under section three hundred and thirty-five, lies on A.

[Section 235 of the old Code of Criminal Procedure (Act XXV of 1861) enacted that it should not be necessary to allege in the charge any circumstances for the purpose of showing that the charge did not come within any of the general exceptions contained in Chapter IV of the Indian Penal Code: and section 236 enacted that it should not be necessary at the trial, on the part of the prosecution, to prove the absence of such circumstances in the first instance: but that the accused person should be entitled to give evidence of the existence of any such circumstances, and that evidence in disproof thereof might then be given on the part of the prosecution. Section 237 then provided that when the section referred to in the charge contained an exception *not being one of such general exceptions*, the charge should not be understood to assume the absence of circumstances constituting such exception so contained in the section, without a distinct denial of the existence of such circumstances.[1] The Evidence Act expressly repealed (see Schedule) section 237 of Act XXV of 1861. The whole of the Act was subsequently repealed by the new Code of Criminal Procedure, Act X of 1872, section 439 of which contains provisions as to the mode in which charges are to be drawn up. This section does not, however, expressly mention exceptions, General or Special; but it is clear from its provisions, and more especially from the *Illustrations* appended thereto, that every charge is to be understood as assuming the absence of all circum-

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[1] See Paley on Convictions, 4th ed., p. 195.

stances constituting exceptions, general or special. The above section of the Evidence Act throws upon the accused the burden of proving the existence of circumstances which bring the case within any of the Special as well as any of the General Exceptions of the Penal Code. So far, then, as the Special Exceptions are concerned, an important alteration has been made in the law. With reference to "shall presume," see *ante*, page 81. In India it not unfrequently happens—it has happened many times in the course of my own experience—that a prisoner, charged with a serious offence, makes no defence except the simple plea of "not guilty," and wholly fails to rely upon or to attempt to prove circumstances which undoubtedly exist and would bring his case within one of the General or Special Exceptions of the Penal Code. Himself ignorant of the law, he is probably also without means to engage the services of such legal advisers as are available. In such cases when anything transpires during the trial to show, or when it appears from the depositions taken by the committing Magistrate that there are or may be such circumstances, it is submitted that it falls within the duty of a Judge as defined by sections 256 and 264 of the Code of Criminal Procedure, and by section 165 of the Evidence Act, to elicit from the witnesses such information, or, if need be, to adjourn the case for such additional evidence, as shall establish the existence of these circumstances or otherwise.]

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a.*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b.*) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[In a suit brought against a zemindar to reverse the sale of a *patni* tenure on the ground of non-service of the notice required by clause 2, section 8, Reg. VIII of 1819, it was held, with reference to this section, that the burden of proving service of the notice lay on the defendant zemindar (*Durga Charan Sarma Chaudhri* v. *Syud Najanudin, &c.* 21 W. R. 397). In the case of *Naba Kissen Mukherji* v. *Promothanath*

Ghose and others (5 W. R. Civ. Rul. 148) the plaintiff, who was formerly *patnídár* of the village, sued for the possession of certain land which he claimed as *lakheraj*, and from which he stated that he had been ousted by the defendant, who had become *patnídár* by purchase at a sale held under Bengal Regulation VIII of 1819. Although, according to the general rule, it would have lain upon the defendant to show that the land was *mál* or rent-paying after 1790, yet it was held that as plaintiff, by reason of his having been formerly *patnídár* of the village, had special means of knowledge and was in a position to prove the area of the *mál* lands, the burden of proof lay on him in the first place to show that the disputed land was not within this area. In *Ram Kúmar Rai* v. *Bijai Gobind Baral* (7 W. R. Civ. Rul. 535) the dispute was between the zemindar and his tenant. The latter held lands of considerable extent under the former, but objected that one of the two plots occupied by him had been held under a different title. It was decided that under such circumstances it was for the defendant to prove a matter which was peculiarly within his knowledge. From these cases was distinguished *Giridhar Hari* v. *Kali Kanth Rai Chaudhri* (3 B. L. R. A. C. 161) which resembled the latter of them, except in this that the defendant was not a tenant, but was sued as a trespasser and a wrong-doer. When the sons of a living father bring a suit against a creditor to get rid of a charge on the ancestral estate created by him, on the ground of his alleged misconduct in extravagant waste of the estate, the antecedents of their father's career being more likely to be in the knowledge of the sons, members of the same family, than of a stranger, the *onus* of disproving the charge may properly be placed upon them (see the remarks of their Lordships of the Privy Council in the case of *Hanúman Persâd Panday* v. *Mussamat Babúi Manraj Kunwári* 7 Moo. Ind. Ap. 419).

Examples of this Rule.

The alteration of documents and the effect of such alteration may well be considered in connection with the present subject. "When the instrument on its production," says Mr. Taylor, "appears to have been altered, it is a general rule that *the party offering it in evidence must explain this appearance*, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice; because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion. If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is

Alteration of Documents.

restored[1] . . . . . It may be laid down as a general rule that wherever it is an *offence* to alter a document after it has been completed, the law presumes, *primâ facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence. With respect, however, to a bill of exchange or a promissory note the law presumes nothing, but leaves the jury to decide, *first*, by inspecting the instrument itself, whether any alteration has been made; and, *then*, on considering the extrinsic evidence offered, at what time and under what circumstances such alteration, if any, was made. These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide not on conjecture but on proof. The rule of law applicable to this subject is, that any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps also with this additional proviso that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it. . . . . The grounds of the doctrine are twofold. The *first* is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without any risk of losing by the event in case of detection. The *other* is to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned" (§§ 1616—1618). The rule applies only when the party producing the instrument is seeking to enforce it or claiming an interest under it. The instrument "may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact," said Lord Abinger in a case in which an altered lease was admitted to show the terms of the holding, the relation of landlord and tenant being admitted on the record (Taylor, §§ 1621—1622). The case of *Davidson* v. *Cooper*[2] established in England the doctrine that every material alteration of an instrument, while in the custody of the party seeking to give it effect, *even by a stranger and without the privity of either party, vitiates that instrument when relied on as the foundation of a right sought to be enforced*, and this even though the alteration was the effect of pure accident or mistake. Mr. Taylor very reasonably contends against the hardship and injustice of this doctrine, and points

Case of Material Alteration.

[1] As to the mode of attesting alterations in wills, see section 58 of the Indian Succession Act, X of 1865.

[2] 11 Meeson & Welsby's Reports, 778, 799, 802; and 13 *ib.*, 343.

out that it has not been recognized by the Irish Court of Exchequer; nor in America, where the New York Civil Code allows the party producing a writing altered in a material part to show that the alteration was made by *another without his concurrence*, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. He maintains that the sound rule of law cannot be carried further than this, that any party seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made either before its execution or at a time when the instrument was not in his possession, or under his control.

Case of Immaterial Alteration.

If the alteration be an *immaterial* one, it will, if made *fraudulently* by the party claiming under the instrument, avoid it so far as he is concerned. If, however, it have been done innocently and to no injurious purpose, it will not have this effect. In the case of *Aldous* v. *Cornwell*,[1] the words "on demand" had been added to a promissory note by the plaintiff, or while the note was in his hands. It was held that this alteration did not avoid it, as the words were immaterial and merely expressed what the law would have supplied. The same principle was followed by the Bombay High Court in *Tikamdás Javáhirdás* v. *Gangákom Mathurádás*, 11 Bom. H. C. Rep. 203.

Indian Cases.

In *Petamber Manikji* v. *Motichand Manikji* (1 Moo. Ind. Ap. 420) Lord Wynford said:—"If a plaintiff produces a bond in this country or any other instrument which appears to have been altered, the Court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature. There is no such evidence here, and this is the whole of the case of the plaintiff below." In *Madan Mohan Kundu* v. *Safima Bewa and others* (Sutherland's Rulings on References from the Mufassil Small Cause Courts, p. 69) the defendant pleaded that the bond, on which the suit was brought, had been tampered with by the plaintiff, and so avoided. It was held that an erasure or alteration in a document in the possession of a plaintiff, and on which he relies in support of his case, must be fully and satisfactorily explained by him, and cannot be presumed to have taken place before the execution of the document. In the case of *Mussamut Khub Kunwar and others* v. *Babu Mudnarain Singh and others* (9 Moo. Ind.

[1] L. R. 3 Q. B. 573.

a material alteration after execution if made with consent of parties does not vitiate the deed. Isae Mahomed v. Bai Fatma
2 RR 10 Bom 487

Ap. 1) it was laid down as follows:—"It may be conceded that in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, *independently of the instrument*, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence; and such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document."]

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

108. [Provided that when[1]] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive, is [shifted to[2]] the person who affirms it.

[According to Hindú law, *twelve* years must have elapsed before an absent person, of whom nothing has been heard during this period, can be presumed to be dead; and no right can accrue to any person as heir of such an absent person until the expiry of *twelve* years from the date on which he was last heard of (*Janmajai Mazumdar* v. *Keshab Lal Ghose and another*, 2 B. L. R. A. C. 134: *Guru Das Nag and another* v. *Matilal Nag and others*, 6 B. L. R. App. 16). According to Muhammadan law, *ninety* years from his birth must have elapsed before the death of a missing person can be presumed (Hedaya, Book

[1] The words in brackets were substituted for "when" by section 9 of the amending Act, XVIII of 1872.

[2] The words in brackets were substituted for "on" by section 9 of the amending Act, XVIII of 1872.

xiii: *Rukhi Bibi* v. *Rahat Bibi, &c.* 7 N.-W.-P. Rep. 191). The effect of the above two sections may be to establish one uniform rule in all cases, though as to this there is some doubt. In *Parmeshar Rai, &c.* v. *Bisheshar Singh, &c.* (I. L. R. 1 All. 53) the next reversioner entitled to an estate on the death of a widow in possession had not been heard of for eight or nine years, and there was no proof of his being alive. The reversioner nearest after him sued to set aside an alienation made by the widow. It was held that, for the purposes of such a suit, the death of the next reversioner might be presumed under the above section, although, if the case were one of succession or inheritance (see section 24 of Act VI of 1871, *ante*, p. 4, note) it might be necessary to apply the rule of Hindu law. Though *death* is to be presumed, it is to be observed that there is no presumption as to the time of death, and therefore if any one has to establish the precise period during those seven years at which the person died, he must do so by evidence, and can neither rely on the one hand upon the presumption of death, nor on the other upon the presumption of the continuance of life, Taylor § 157.]

Burden of proof as to partnership, tenancy, and agency.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

[As to Partnership, see Chap. XI, sections 239—266 of the Indian Contract Act, IX of 1872. Section 264 enacts that persons dealing with a firm shall not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution. The party alleging that notice was given will, as a general rule, have to prove this allegation.

Partnership.

As to the relation of Principal and Agent, see Chap X, sections 182—238 of the same Act. Section 206 enacts that reasonable notice must be given of revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. Section 208 enacts that the termination of the authority of an agent does not, so far as regards the agent, take effect

Agency.

before it becomes known to him; or, so far as regards third persons, before it becomes known to them.

Landlord and Tenant.

Where two persons set up rival claims to the tenancy of the same piece of land under the same landlord, and one of them admitted the previous tenancy of the other, who, he pleaded had relinquished the land, which was upon this leased to himself, it was held that it lay upon him to prove the relinquishment which he thus alleged (*Kissen Chandra Saha and others* v. *Hukum Chand Saha and others*, W. R. Jan—July, 1864, Civ. Rul. 47). With reference to section 19 of Act X of 1859, and section 20 of Act VIII (B. C.) of 1869, which provide for a written notice of relinquishment to be served on the landlord through the medium of the Court, it has been decided that if the tenant have taken the steps so provided by law in furtherance of his intended relinquishment, the burden of proving that he continued to hold possession of the land, notwithstanding that such steps had been taken by him, will fall upon the landlord. If, on the other hand, the tenant have not taken these steps, it will be for him to show that the landlord took possession of the land, and enjoyed the profits by holding it *khas* (*i. e.* in his own possession) or by letting it to other parties (*James Erskine* v. *Ram Kumar Rai and others*, 8 W. R. Civ. Rul. 221). In the case of *Tilak Patak* v. *Mahabír Panday and another* (7 B. L. R. App. 11) it was held that the above sections, relating to service of notice of relinquishment, have no application where the tenant holds under a lease for a definite term—that the presumption here is in favour of relinquishment on the expiry of the term—and that it is for the landlord, who avers that the tenant (defendant in a suit for arrears of rent) did not so relinquish, to prove that he continued to hold over. It may be a question whether this decision will continue to be law under the above provisions of the Evidence Act. It may, however, be observed that these provisions are founded on a general presumption arising from the experienced *continuance*, for a longer or shorter period, of human affairs, and that whatever room there may be for such a presumption when no definite term has been fixed for the continuation of the tenancy, it would appear to be excluded by the circumstances of the case, when such a term has been fixed. The provisions of section 114, *post*, may, perhaps, be wide enough to include such a case.]

Burden of proof as to ownership.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is

not the owner is on the person who affirms that he is not the owner.

[Men generally own the property which they possess, and *possession* is therefore presumptive proof of *ownership*. The rule applies to property real and personal, movable and immovable. A plaintiff, seeking to eject a person from immovable property and to obtain possession thereof for himself, must in consequence recover by the strength of his own legal title, and cannot in the first instance call upon the defendant to show the title under which he holds. In the case of *Jawala Baksh* v. *Dharam Sing* (10 Moo. Ind. Ap. 528) their Lordships of the Privy Council said:—"The appellant was in possession of the estate. He and his father had held continual possession of it from December, 1843, if not from October, 1842. His own possession of it had been unquestioned since February, 1845, when he was recorded as the proprietor of it. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate, *i. e.* a title which would give the claimant a right to the estate, failing the title impeached. The judgment of the Sadr Court assumes that the title set up by the plaintiffs may be wholly bad. . . . . The effect, therefore, of the judgment is to defeat the appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession. . . . . It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession. They conceive that the first question which the Sadr Court ought to have decided, and which must now be decided on this appeal, is whether the plaintiffs have shown any title to this property." In the case of *Ram Rattan Rai* v. *Farúksúnnissa Begam and Rúkya Begam* (4 Moo. Ind. Ap. 233) the defendant was in possession of certain land under a deed of sale from the person last seised, and was forcibly ousted by the plaintiffs, who claimed under a deed of gift from the same person. The defendant was by an order of the Criminal Court restored to possession, the plaintiffs being directed to bring a civil suit to establish the title set up by them They did so, and it was held in this suit that it was incumbent on them to prove their right to the land claimed by them before they could put the defendant to proof of his title. So in *Rájá Barodakanth Rai* v. *Babú Chandra Kúmar Rai*, *&c.* (12 Moo. Ind. Ap. 145) one of the claimants in a case of disputed boundaries was in possession by virtue of a Magistrate's order made under Act IV

Rule illustrated.

of 1840,[1] and it was held that it lay on the party seeking to oust him to show a better title to the land claimed than that of the party in possession. In *Sevvají Vijaya Raghanadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti* (10 Moo. Ind. Ap. 151), the plaintiff sued to recover a village in the possession of the defendant, whose title and that of his predecessor's had been unchallenged for forty-four years. His allegation was that his ancestor had merely mortgaged the land to the ancestor of the defendant, and that the defendant was only an usufructuary mortgagee in possession. It was held that the *onus probandi*, or burden of proof, was on the plaintiff, who could only succeed by the strength of his own title, and not by reason of the weakness of the defendant's title. "A plaintiff," it was said, "who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of the opponent's. It would be contrary to all principles of law and justice, that upon such an allegation a plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so, to dispossess him of the land in question." The burden of proof was also laid on the plaintiff in the similar case of *Ratan Kuar, &c.* v. *Jiwan Singh, &c.* (I. L. R. 1 All. 144), where the defendants, admitting the former proprietary right of plaintiff's ancestor, set up a purchase from him some thirty years previously: see also *Sheoruttungir, &c.* v. *Dúrga, &c.* 6 N.-W.-P. Rep. 36. Where a plaintiff sued to recover possession of certain lands, alleging that they had been granted by his ancestor to P. R. to be held in *jagír* tenure by P. R. and his lineal descendants, that P. R.'s lineal descendants had failed, and therefore plaintiff was entitled to resume possession, it was held by the Privy Council that it lay upon the plaintiff to prove the grant to P. R. in the first instance: and that, until he had done this, he had no standing in Court: *Maharájdh Jagarnath Sahi, &c.* v. *Mussamat Ahlad Kowar, &c.* 19 W. R. 140. In the case of *Ranjit Ram Panday* v. *Goberdhan Ram Panday* (20 W. R. 25) there was strong evidence of possession on one side, opposed by evidence apparently strong on the other side; and the presumption that possession goes with the title was held to make more probable the case of that side on which this presumption arose.

The following cases may also be referred to:—*Rájá Mohesh Narain*

[1] This Act was repealed by Act XVII of 1862. The analogous provisions of existing law will be found in sections 530—535, Chapter XL of the Code of Criminal Procedure, Act X of 1872.

Singh v. *Krishnanand Misser and another*, 9 Moo. Ind. Ap. 324 ("it would be monstrous to make the title to land in a purchaser depend, years after it has accrued and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time"): *Tiery* v. *Krishtodhan Bose*, L. R. 1 I. A. 83 (expediency of insisting on strict proof on part of plaintiff in ejectment): *Forbes* v. *Mir Mahomed Hosen*, 12 B. L. R. 215 (here the Privy Council said:—"It is, however, to be observed that the course of modern legislation and also of modern decision has, if not in the case of *lakheraj* lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases by giving force to the contrary presumptions arising from proof of long and undisturbed possession"): *Rani Súrnamayí* v. *Watson & Co.* 20 W. R. 211 (the Privy Council said:—"The suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of her own title and not upon the weakness of that of her adversary. It is immaterial, therefore, to consider whether the land is the property of the defendants or not, because, whether it is their property or not, unless it is proved to be the property of the plaintiff, she is not entitled to turn them out"): *Sham Narain, &c.* v. *The Court of Wards, &c.* 20 W. R. 197: *Rahmatula Saheb* v. *Mahomed Akbar Saheb, &c.* 8 Mad. H. C. Rep. 63: *Ashrafúnissa Begum* v. *Raghúnath Sahai and others*, 2 W. R. Civ. Rul. 267 (suit by the alleged assignee of a mortgagor under a *zúr-i-peshgí* lease to recover possession of the land from the alleged mortgagee on payment of the alleged balance due): *Chandra Maní Chandhrain* v. *Raj Kissore Saha*, 5 W. R. Civ. Rul. 246 (suit to recover land which the plaintiff alleged that he had purchased at a sale in execution of a decree): *Púlin Behari Sen* v. *R. Watson & Co.*, 9 W. R. Civ. Rul. 190 (the party who avers a title must make out such title, even it it be necessary to prove a negative in order to do so): *Mussamat Harasundarí Debya and others* v. *Mussamat Amína Begum*, 1 Jur. N. S. 188: *Srimatí Debya* v. *Madan Mohan Singh*, 2 B. L. R. A. C. 326 (suit to recover possession of land seized in execution, sold after rejection of a claim by plaintiff, and purchased by judgment-creditor, who sold to the defendant, who ousted plaintiff). Where the plaintiff in a suit for declaration of title made out a *primâ facie* title to the property by producing the title-deeds in favour of himself, it was held that it lay upon the defendant to disprove this title (*Swarnamayí Raur* v. *Srinibash Kayal*, 6 B. L. R. 145).

The rule has, however, no application when the possession has been obtained by force or fraud. A man cannot be allowed to take advan-

tage of his own wrong in order to shift the burden of proof to his opponent. Where, therefore, the plaintiff proves that he was in possession and was ousted by the defendant otherwise than by due course of law, the burden of proving a title is shifted upon the defendant in the first instance (*Jadabnath and another* v. *Ram Sundar Surmah and another*, 7 W. R. Civ. Rul. 174: *Radha Ballab Gosain and others* v. *Kissen Gobind Gosain*, 9 W. R. Civ. Rul. 71: *Gaur Parey* v. *Umasundari Debya*, 12 W. R. Civ. Rul. 472: *Mahesh Chandra Bandopadhya* v. *Srimati Baroda Debi*, 2 B. L. R. A. C. 275). Under the provisions of section 9 of the Specific Relief Act, I of 1877, which takes the place of the repealed section 15, Act XIV of 1859, if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he, or any person claiming through him, may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit. But nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof. No appeal lies from an order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed. The object of these provisions is to discourage parties from taking the law in their own hands, and from asserting their rights by force. The result of a suit under the section is to restore to possession the party ousted by force, and to leave the question of title wholly untouched and open to litigation in a regular suit. When, therefore, a regular suit to establish title and recover the land is brought against the party so restored to possession, the whole burden of proof is upon the plaintiff in such regular suit; and, until he can show a title to the property, the Court will not look into the defendant's title or disturb his possession (*Mulvi Meinudin* v. *Girish Chandra Rai Chaudhri*, 7 W. R. Civ. Rul. 230). If he prove twelve years' undisturbed possession antecedent to the ejectment under the summary order made under the above section, this will be a good title, sufficient at least to throw upon the defendant the burden of proving a better one (*Ram Chandra Chaudhri* v. *Brojanath Sarma*, 3 B. L. R. App. 109: *Ballabi Kant Bhattacharyya and another* v. *Durjadhun Sikdar, &c.* 7 W. R. Civ. Rul. 89). When a person ousted otherwise than by due course of law fails to avail himself within six months of the summary remedy provided by this law, and afterwards brings a regular suit to recover possession, it has been questioned whether the burden of proof ought to be laid upon him or upon the defendant. Section 9 of Act I of 1877, however, provides a special and a summary

Possessory Suit under section 9 of the Specific Relief Act, 1877.

remedy, and doubtless was not intended to interfere with the ordinary rule that a man cannot be permitted to take advantage of his own wrongful act to shift the burden of proof upon his opponent. In this view it may well be held that, as soon as the plaintiff has proved former possession and dispossession by the defendant otherwise than by due course of law, the burden of proving a superior title will be on the defendant. The following cases favour this view, *viz.*:—*Khájáh Enayatúla Chaudhrí* v. *Kissen Sundar Surma and others*, 8 W. R. Civ. Rul. 386: *Ayesha Bibi, &c.* v. *Kanhye Múlah, &c.* 12 W. R. Civ. Rul. 146: *Shama Sundarí Debya* v. *The Collector of Malda, &c.* 12 W. R. Civ. Rul. 164: *Trilochan Ghose, &c.* v. *Kailasnath Sidhanta Bhaumik Bhattacharjya, &c.* 3 B. L. R. A. C. 298: see however, *Amír Bibí, &c.* v. *Takrúnissa Begam, &c.* 7 W. R. Civ. Rul. 332, and on review, 8 W. R. Civ. Rul. 370: and *Ram Dutt Chaudhrí* v. *Lakhhí Koer*, 11 W. R. Civ. Rul. 447. It may scarcely be necessary to observe that possession may be proved by oral evidence (*Maniram Deb* v. *Debí Charan Deb and others*, 4 B. L. R. F. B 97.]

Proof of good faith in transactions where one party is in relation of active confidence.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(*a.*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b.*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

[The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a confidence in him, is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void *ipso facto*, nor is it necessary for those who impeach it to establish that there has been fraud or imposition,

Principle administered in Courts of Equity.

but the burden of establishing its perfect fairness, adequacy, and equity is cast upon the person in whom the confidence has been reposed.[1] The rule applies equally to all persons standing in confidential relations with each other. In addition to the instances of the application of the rule supplied by the *Illustrations*, the following also may be mentioned:—where a guardian or other person standing in the place of a parent purchases or takes a gift of property from his ward before or immediately after the latter has come of age: where a minister of religion, medical attendant, or other person has, through the means of a position presenting peculiar opportunities, acquired special confidence. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The section requires that the party on whom the burden of proof is laid should have been *in a position of active confidence*. There is a distinction between a confidential adviser who is generally *consulted* in the management of an individual's affairs, but who takes no part in such management, and an agent, steward, or other person who undertakes an office or engages actively in the concerns of such individual and in the general management thereof. It will be important to draw a distinction between the class of cases with which this section is concerned, and another class of cases already referred to (*ante*, pp. 443—447). Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger, that is to say, a person not standing in any confidential or fiduciary relation towards the donor, equity will not set aside a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence; and spontaneously executed or made by the donor with his eyes open. And it is equally clear, that in all cases where it has been proved that a mere stranger, connected with the donor by no peculiar or fiduciary relation from which undue influence can be inferred, has, either by fraud, surprise, or undue influence, obtained from him a voluntary donation, a Court of Equity will at once set it aside; in such cases, however, *the proof of fraud, surprise, or undue influence is completely upon the donor* or person deriving title from him, for *primâ facie* the donation is valid.[2] Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person *gains a great advantage over* another by a voluntary instrument, the burden of proof is thrown upon the person receiving the

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[1] See Story's Equity Jurisprudence, §§ 309—327: and *Huguenin* v. *Baseley*, 2 Leading Cases in Equity, 3rd *ed.* 504.

[2] 2 Leading Cases in Equity, 529—530.

benefit, and he is under the necessity of showing that the transaction is fair and honest; for, although the Courts never prevent one person from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary, and not produced by any undue influence or misrepresentation.[1] The Evidence Act does not provide specially for this last case, though it may possibly fall within the purview of section 114, *post*.

In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are not of very great importance in such cases: they are, however, important when no such confidential relation exists.[2]

Indian Cases.

The above principles have been acknowledged and acted upon in more than one Indian case. In *Múnshí Bazlúr Rahím* v. *Shamsúnissa Begam* (11 Moo. Ind. Ap. 551) a Muhammedan wife had brought a suit against her husband to recover the value of real and personal estate including certain Company's paper, which it was alleged was her separate property, and had been, as she lived in seclusion, endorsed and handed over by her to her husband for the purpose of obtaining the interest thereon. The defence was that the husband had purchased this paper from her, and had, on endorsement and delivery, paid her full value for the same. It was held that the husband was bound to show something more than the mere endorsement and delivery of the paper, and that, from the relations subsisting between the parties, the burden of proof was upon him to establish—*first*, that the transaction which he set up was a *bonâ fide* sale; and, *secondly*, that he had given full value for the paper. "That all these securities came to her hands whilst she was an inmate of his *zenanah*," said their Lordships: "that they all passed from her to him; that some of them remain in his possession, and that others have been traced to his creditors—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between husband and wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to

[1] 2 Leading Cases in Equity, 543.

[2] 2 Leading Cases in Equity, 543: and see *Chedambara Chetty* v. *Renja Krishnó Muthu Vira Puchanja Naiker*, 13 B. L. R. 528.

the rights and interests of the wife. Her case is, that the securities were entrusted to him for a particular purpose, *viz.* that of receiving the interest on them for her, and that, though they may have been endorsed, she never meant to transfer the property in them. His case is that he purchased them from her on several occasions, and that on their endorsement and delivery he paid her the value for them The principle of the judgments of the Courts below seems to be, that although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that, the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion that this is *a sound principle, and in accordance with the long-established practice of the Courts in India.* The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Muhammedan and a Hindú woman; nay, that in all that concerns her power over her property, the former is by law more independent than an English woman of her husband. It is no doubt true that a Mussulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition; but the Hindú law is equally indulgent in that respect to the Hindú wife. It may also be granted that in other respects the Muhammedan law is more favourable than the Hindú law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Mussalman woman of rank, like the Hindú, is shut up in the zenanah, and has no communication, except from behind the *pardah* or screen, with any male person, save a few privileged relatives or dependants. The culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a *pardah-nashín*,[1] and

[1] As to the necessity of strict proof where *pardah-nashín* women are concerned, see also *Azizúnissa, &c.* v. *Baqur Khan*, 10 B. L. R. 205: *Asmatanissa* v. *Alla Hafiz, &c.* 8 W. R. Cr. Rul. 468: *Delrus Banu Begum* v. *Nawab Syud Asgur Ali*

that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him." The case of *Abdúl Alí*, alias *Shoageea* v. *Karímanissa* (19 W. R. Civ. Rul. 153) was also a suit by a Muhammedan female against her husband, from whom she had been divorced, to recover property, into possession of which the defendant had come by reason of his marriage with the plaintiff, and which he was found not to hold in his own right. The burden of proof was here also laid upon the husband. In the case of *Rúp Narain Singh and others* v. *Gangadhar Persad Narain and others* (9 W. R. Civ. Rul. 297) a Hindú *pardah-nashín* woman, acting as guardian of her minor sons, had sold three estates to the persons who held them under *zúr-i-peshgí* mortgages, and who therefore were liable to account to the minors on behalf of whom their mother was acting. The minors, on coming of age, brought an action to impeach the sales, and it was held to lie upon the purchasers to prove the honesty of the transaction, partly because they had purchased from a *pardah-nashín* female and partly because the purchase was that of the property of a person under a disability (see *ante*, pp. 443—447). In the case of *R. A. Pushong* v. *Múnia Halwaní* (1 B. L. R. A. C. 95) the transaction was between persons standing in the relation of legal adviser and client, and related to the subject of litigation or advice. Such a contract, it was observed, is liable to be questioned by the other side at any time, and when it is questioned, every presumption is made against its being just. Undue influence is presumed to have been exerted until the contrary is proved; and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair, adequate, and reasonable. Failing that, his claims and rights under the contract must fail. See also *Takurdín Tewarí* v. *Nawab Syud Ali Hosein Khan, &c.* L. R. 1 I. A. 192; S. C. 13 B. L. R. 427; S. C. 21 W. R. 341: *Pannalal Seal* v. *Srímatí Bama Sundarí Dasí*, 6 B. L. R. 732: and *Grose and another* v. *Amírtamayí Dasí*, 4 B. L. R. O. J. 1. In the case of *Ram Persad Misser* v. *Rani Phúlpatí* (7 W. R. Civ. Rul. 99) the same principle was applied to a deed-of-gift of property, made by a Hindú *pardah-nashín* woman to a *Mukhtar* employed by her to conduct certain suits.]

Birth during marriage conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and

Khan, &c. 15 B. L. R. 157; S. C. 23 W. R. 458: *Bibi Rukhun* v. *Sheikh Ahmed Hosein, &c.* 22 W. R. 443: *Girish Chandra Lahori* v. *Bhagobati Debya, &c.* 13 Moo. Ind. Ap. 419.

eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten

[The legal maxim is, *Pater est quem nuptiæ demonstrant*—"He is the father whom the nuptials indicate." See the maxim applied in the case of Muhammedans in *Jeswant Singh Jí Ubby Singh Jí and another* v. *Jet Singh Jí Ubby Singh Jí* (3 Moo. Ind. Ap. 150). Unless it be shown that the parties to the marriage had no access, the fact that the woman was living in notorious adultery will not be sufficient to rebut the presumption of legitimacy. Under English law the presumption may be rebutted by proof of the impotency of the husband. The above section scarcely makes provision for this. When non-access is proved until within six months of the woman's delivery, the husband will be presumed, in accordance with the invariable course of nature, not to be the father of the child.[1] As to "conclusive proof," see section 4, *ante*. It may be supposed that the provisions of this section will supersede certain rather absurd rules of Muhammedan law, by which a child born six months after marriage, or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring. See the Hedaya, Chap. XIII, and Macnaghten's Hindú Law, Chap. VIII, § 31.]

Proof of cession of territory.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

[The effect of this section and the power of the Indian Legislature to enact it were discussed in the case of *Dámodar Gordhan* v. *Ganesh Devrám et al* (10 Bom. H. C. Rep. 37), on appeal to the Privy Council, *Dámodhar Gordhan* v. *Deorám Kamjí* (I. L. R. 1 Bom. 367; S. C. L. R. 1 I. A. 102). The Lords of the Privy Council here said:—

[1] 1 Macqueen's Scotch Appeal Cases, House of Lords, 277: *R.* v. *Luffe*, 8 East's Reports, 202.

"Nothing, in their judgment, turns in this case upon the Indian Evidence Act of 1872, section 113. The Governor-General in Council being precluded by the Act 24 and 25 Vict. Cap. 67, section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not by any legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession." As to "conclusive proof," see section 4, *ante*. See in connection with this section, clause 7, section 3, Bengal Regulation XIV of 1825, which enacts that, for the purposes of that Regulation (*viz.* the inquiry into the validity of lakheraj grants), the following shall be held to be the periods at which the several provinces subordinate to the Bengal Presidency were acquired by the British Government, namely, for Bengal, Behar, and Orissa (excepting Cuttack), the 12th August, 1865: for Benares, the 1st July, 1775: for the provinces ceded by the Nawáb Vizier, the 1st January, 1801: for the provinces ceded by Daulat Rao Scindia and the Peshwah, the 1st January, 1803: for the provinces of Cuttack, Puttaspore and its dependencies, the 14th October, 1803: for the pergunnah of Khandah, and the other territory ceded by Nana Gobind Rao, the 1st November, 1817.]

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a.*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

[When the possession is very recent, the presumption usually made is that of *theft* (see *The Queen* v. *Purmeshur Ahír*, 23 W. R. Crim. Rul. 16). In order to warrant the presumption of *receiving*, it has been thought that there should be evidence of some other person having committed the theft; see the observations of *Patteson, J.* in the cases

§114 (ill e). There is no impropriety in referring a ~~to dine~~ thing as having been done where the thing is required to be done by a section in a statute (Vrindavan v. G. 26. R 96. I.C. 1039 24 A.L.J. 825. But the provisions are enabling such a provision does not arise (Sona Chalam v. Kumaravelu 1928 M. 77. F.B. If an official act is proved to have been done, it will be presumed to have been regularly done. But where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person, who alleges that that liability has been incurred ~~that~~ to prove that the things prescribed in the Act have been actually done (Walvekar v. E. 30 C.W.N. 713; 53 Cal. 718).

The meaning of the illustration is that if an official act is proved to have been done it will be presumed to have been regularly done [per Woodroffe J. Narendra Lal v. Jogi Hari 32 Cal 1107; 2 C.&R 107]

In my of Sholapur v. the Sholapur Sp. Co. 20 A. 732 it was held that in the absence of evidence to the contrary the Court will presume that the municipality has adopted the regular procedure. See however Ashanulla v. ~~Pitambar~~ Tinlochan 13 Cal 107, where it has been held that where under an Act, certain things were required to be done, before any liability attaches to any person in respect of any right or obligation it is for the person, who alleges that the liability has been

of *R.* v. *Densley*, 6 C. and P. 399; and *R.* v. *Woolford*, 1 M. and Rob. 384. What amounts to recent possession sufficient to justify the presumption in any particular case varies according as the stolen article is or is not calculated to pass readily from hand to hand. See the cases quoted, Roscoe, pp. 18—20: and Tay. § 122.]

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

[See section 133, *post*, and the note thereto.] 24 W.R. cr. c. 56, 55.

(*c.*) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

[Bills of exchange and promissory notes form an exception to the general rule that the consideration for a contract must be proved. They are *primâ facie* presumed to be founded on a valuable consideration, partly to secure their negotiability, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed.—See Tay. § 127 and Story on Bills, §§ 16, 178.]

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*e.*) That judicial and official acts have been regularly performed;

[*Omnia præsumuntur rite esse acta*—"All things are presumed to have been duly performed—" See Tay. §§ 124, 124A., 125, 126: and Broom's Legal Maxims, p. 907. For a special presumption to be made in administering the Rent Law in the North-Western Provinces, *viz.*—that what purports to have been done by public authority has been rightly done; see section 9, Act I of 1874.]

(*f.*) That the common course of business has been followed in particular cases;

[As for example, the course of business in the Post-office. See section 16, *ante*.]

(*g.*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

[See Tay. §§ 101, 499, 729; and the case of *Armoury* v. *Delamirie*, 1 Smith's Leading Cases, 357, in which a jewel found by a chimney-

sweeper's boy was presumed to be of the best description as against the jeweller who had received it from the boy and refused to return it.]

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

[See sections 9-12 of the Indian Oaths' Act, X of 1873.]

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

[See Tay. § 146 and cases there quoted; also *Shearmam* v. *Fleming and others*, 5 B. L. R. 619; and *Abdúl Karim* v. *Manji Hansraj*, *&c.* I. L. R. 1 Bom. 295.]

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

As to illustration (*a*)—A. shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to illustration (*b*)—A., a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B., a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b*)—A crime is committed by several persons. A., B., and C., three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D., and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to illustration (*c*)—A., the drawer of a bill of exchange, was a man of business. B., the acceptor, was a young and ignorant person, completely under A.'s influence:

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

incurred to prove that the things prescribed by the Act have been done. No presumption can be made in favour of the things prescribed by the Act having been done.

Under the section each case must be decided according to its peculiar circumstances (Gopal v. Krishna 3 B.L.R. 430. See also Mahipat v. Laxman 24 Bom 406; 2 B.L.R. 228)

As to illustration (*f*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

History of Presumptions.

[Presumptions have usually been divided by English text-writers into two classes: *viz.—presumptions of law* and *presumptions of fact.* Presumptions of law consist of rules which in certain cases either prohibit or dispense with any ulterior enquiry. They are founded either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. Where the uniform experience of mankind has found this connection to exist, the law recognizes it without further proof. The correctness of the presumption is more or less probable in proportion to the uniformity of the experience. Presumptions of law have, therefore, been divided into two kinds—*Conclusive* and *disputable* (see *ante*, section 4). "*Conclusive*,

Conclusive Presumptions of Law.

or, as they are elsewhere termed, *imperative* or, *absolute* presumptions of law," says Mr. Taylor, "are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long-experienced connection, just alluded to, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and, therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden."[1] As has already been pointed

[1] § 62.

out, these presumptions correspond with "*conclusive proof*," as defined in section 4, *ante*. The Evidence Act creates two such presumptions, namely, as to legitimacy (section 112), and as to cession of territory (section 113); and there are some others to be found in the Indian Statute Book: *e. g.* a declaration made under section 6 of the Land Acquisition Act, X of 1870, and published in the *Gazette*, is conclusive evidence that the land which forms the subject thereof is needed for a public purpose or for a company (see section 6 of the Act):—a statement by a Magistrate to the effect that a proclamation was duly made for a person charged with a warrant offence who has absconded is, under section 171 of the Code of Criminal Procedure, conclusive evidence of due compliance with the law:—a certificate given to a purchaser at a sale for arrears of land-revenue, or of public demands recoverable as land-revenue, is, under section 8, Act VII (B. C.) of 1868, conclusive evidence that all the necessary notices have been served and posted:—the register prepared under section 26 of the "Chota Nagpore Tenures Act," II (B. C.) of 1869, is conclusive evidence of all matters recorded therein in pursuance of the Act:—a notification by the Local Government under section 5 of "The Criminal Tribes' Act," XXVII of 1871, is conclusive proof (section 6, *idem*) that the provisions of the Act are applicable to the tribe, gang, or class specified therein:—a notification under section 3 of the Scheduled Districts Act, XIV of 1874, is conclusive as to what enactments are in force, or not in force, in any Scheduled District (section 4); and when any question arises as to the line of boundary between a Scheduled District and other territory, the determination thereof by an officer appointed under section 8, if confirmed by Government, is conclusive in all Courts of Justice. See also (as to the boundary of the Sunderbuns) *Rájá Baradakanth Rai* v. *The Commissioner of the Sunderbuns*, 2 B. L. R. P. C. 41.[1]

Disputable Presumptions of Law.

Disputable, or, as they have been otherwise termed, *rebuttable* presumptions, are "as well as the former," says Mr. Taylor, "the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the

[1] See also sections 26 and 27 of the Limitation Act, XV of 1877, which deal with, as questions of substantive law, certain presumptions (as to easements, &c.) of English text-writers—see *Bhuban Mohan Banerji and others* v. *J. S. Elliott and others*, 6 B. L. R. 85.

other in the absence of all opposing evidence. In this mode the law defines the nature and amount of the evidence, which is sufficient to establish a *primâ facie* case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions, as in the former, have been adopted by common consent, from motives of public policy and for the promotion of the general good;—yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised. Thus, as men do not generally violate the Penal Code, the law presumes every man *innocent;* but some men do transgress it; and therefore evidence is received to repel this presumption."[1] Sections 79, 80, 81, 82, 83, 84, 85, and 89 create presumptions corresponding to those here described, and there are others to be found in the Indian Statute Book. Raiyats, who, in the provinces of Bengal, Behar, Orissa, and Benares, hold lands at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are entitled to receive *pattas* at these rates (section 3 of Act X of 1859, and section 3 of Act VIII (B. C.) of 1869); and whenever in any suit under either of these Acts it is proved that the rent at which land is held by any such raiyat has not been changed for a period of twenty years before the commencement of the suit, it *shall be presumed* that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown or unless it be proved that such rent was fixed at some later period (section 4 of Act X of 1859 and section 4 of Act VIII (B. C.) of 1869 and section 6 of Act XVIII of 1873). As to the mode of raising the question whether a raiyat is entitled to the benefit of this presumption, see *Harak Singh and another* v. *Tulsí Ram Sahu* (Full Bench), 5 B. L. R. 47. A similar presumption is created by the law in the case of *talukdars* (sections 15 and 16[2] of Act X of 1859, and sections 16 and 17 of Act VIII (B. C.) of 1869). Raiyats having rights of occupancy are entitled to receive *pattas* at fair and equitable rates, and in case of dispute, the rate previously paid by the raiyat is to be presumed to be fair and equitable unless the contrary be shown in a suit by either party (section 5 of Act X of 1859 and section 5 of Act VIII (B.C.) of 1869).

[1] §§ 95, 96.

[2] In *Naffar Chandra Paul Chaudhri, &c.* v. *Poulson* (12 B. L. R. 53; S. C. 19 W. R. 175) the Privy Council held that the presumption was rebutted by production of a decree (made before Act X came into operation), which declared the right to enhance.

Under section 91 of the North-Western Provinces Land Revenue Act, XIX of 1873, all entries in the record-of-rights made by settlement officers must be presumed to be true until the contrary is proved. Under the provisions of section 11 of the Panjab Laws Act, IV of 1872, the right of pre-emption shall be presumed to exist, whether recorded in the list of customs at Settlement or not, in all *village communities*, however constituted, unless the existence of any custom or contract to the contrary can be proved: it shall be presumed to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights of occupancy affecting such lands. The right of pre-emption shall not, however, be presumed (section 12, *id.*), but may be shown to exist in any *town* or *city* or any subdivision thereof. Under section 13 of Act V of 1866, protest of a Bill of Exchange, whether inland or foreign, when purporting to be made by a Notary Public is *primâ facie* evidence that the bill has been dishonoured. Under section 30 of the Indian Companies' Act, X of 1866, a certificate under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be *primâ facie* evidence of the title of the member to the share or shares or stock therein specified. Under section 36 of the same Act, the register of members is *primâ facie* evidence of any matters directed or authorized by the Act to be inserted therein: and under section 170, when any company is being wound up, all books, accounts, and documents of the company and of the liquidator shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded. The presumption is that a man retains his domicile of origin, and the burden of proving a change lies on the person alleging it (see section 9 of the Indian Succession Act, X of 1865).

Presumptions of Fact.

"*Presumptions of Fact*," says Mr. Taylor, "usually treated as composing the second general head of presumptive evidence, can hardly be said with propriety to belong to this branch of the law. They are, in truth, but mere arguments, of which the major premiss is not a rule of law; they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while *those* are reduced to fixed rules, and constitute a branch of the system of jurisprudence, *these* merely natural presumptions are derived wholly and

directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered."[1]

Subject of Presumptions how dealt with in Indian Evidence Act.

The view taken of the subject of presumptions, and the mode in which the subject has been dealt with by the authors of the Indian Evidence Act, is briefly as follows. It was considered that many topics which, properly speaking, have nothing to do with the law of evidence, have been treated under the head of presumptions by English text-writers.[2] Those which were considered to be of real practical importance have been included in the sections of the Act already referred to. "They fall under these heads," said Sir J. F. Stephen: "1*st*—There are a few cases in which it is expedient to provide that one fact shall be

[1] § 169.

[2] "The subject of presumptions," said Sir J. F. Stephen, in moving that the Report of the Select Committee on the Bill be taken into consideration, "is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number, and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable; *Præsumptiones juris et de jure*, *Præsumptiones juris*, and *Præsumptiones facti*. There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half-full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the law of evidence many subjects which in no way belong to it. For instance, there is said to be a conclusive presumption that every one knows the law, and this is regarded as necessary in order to vindicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it, dispenses with the presumption and hands the subject over from the Law of Evidence with which it is accidentally connected, to criminal law to which it properly belongs." *Proceedings of the Legislative Council on the 12th March*, 1872, *page 233 of the Supplement to the "Gazette of India" of March 30th*, 1872. Sir J. F. Stephen's views will be found further stated at pages 131—133 of his work, "The Indian Evidence Act, with an Introduction on the Principles of Judicial Evidence."

conclusive proof of another, for various obvious reasons: the inference of legitimacy from marriage is a good instance. *2ndly*—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for, for instance, may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose Obviously, six or eight would do equally well; but it is also obvious that, to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in Chapter VII of the Bill provide for all of them. A new section (114) has been added to this chapter which deserves special notice. . . . . The fact of this provision, coupled with the general repealing clause at the beginning of the Bill, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject.[1] The illustrations given are, for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question. I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's, it has, at all events, some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failures of justice. On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accompliee; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they

[1] In his "Introduction" Sir J. F. Stephen says, "the terms of this section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives to a greater or less extent an artificial value. Nine of the most important of them are given by way of illustration. All notice of certain general legal principles, which are sometimes called presumptions, but which in reality belong rather to the substantive law than to the law of evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them" (p. 133).

ought not to convict on such evidence, though they can if they choose. How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict, I do not quite understand. At all events it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious."[1]

Artificial and technical rules thus finding no place in the Indian Evidence Act, and the Courts being as free in this respect as they were before the Act was passed, to use their own common sense and experience in judging of the effect of particular facts, it will be useful to notice certain principles in the nature of presumptions, which have usually guided the Courts in dealing with certain questions peculiar to India. When a Hindú family lives in commensality and possesses joint property, the presumption is that all the property, of which the members are in possession, is joint estate, and that all acquisitions have been made from joint funds; and, as already pointed out (*ante*, page 441), the burden of proving any part of such property to be separate or self-acquired is upon the person who alleges that it is so—*Dharm Dass Pandey and others* v. *Massamat Shama Sundarí Debí*, 3 Moo. Ind. Ap. 229: *Naragunty Lutchmí Davamah* v. *Vengama Naidú*, 9 Moo. Ind. Ap. 151: *Pran Krishna Paul Chaudhrí* v. *Mathúra Mohan Paul Chaudhrí*, 10 Moo. Ind. Ap. 403: *Nawab Abed Alí Mírza* v. *Maharáj á Moheshur Baksh Singh*, Sev. Aug.—Dec. 1863, p. 801: *Tara Charan Mukherji* v. *Jai Narain Mukherji*, 8 W. R. Civ. Rul. 226: *Lalla Sridhar Narain* v. *Lalla Madhu Persad and others*, 8 W. R. Civ. Rul. 294 (here the person, who set up the allegation of separate acquisition, had purchased at an execution sale the rights of one member of the family). Whether in order to raise this presumption in respect of acquisitions it must be admitted (as in *Prankishto Mazimdar, &c.* v. *Srímatí Bhagiratí Gúptia, &c.* 20 W. R. 158) or proved that there was a nucleus of joint property from which such acquisitions could have been made, or the

Principles in the nature of presumptions peculiar to India.

[1] *Proceedings of the Legislative Council, pages* 234—235 *of the Supplement to the Gazette of India of* 30*th March*, 1872.

presumption arises from the bare fact of the family being joint, is a question upon which there is some apparent difference of opinion. In *Taruk Chandra Poddar, &c.* v. *Jodeshur Chandra Kúndú* (11 B. L. R. 193; S. C. 19 W. R. 178) Couch, C. J. said:—"The Judicial Committee of the Privy Council in *Nil Krishto Deb Barmano* v. *Bir Chandra Thakur* (3 B. L. R. P. C. 13; S. C. 12 Moo. Ind. Ap. 523) have laid down the rule by which this Court must be guided. Their Lordships say:—'The normal state of every Hindú family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. .....,' These observations have reference to the particular case before their Lordships, but here they lay it down in most distinct terms that every Hindu family is presumably joint in food, worship, and estate; and the same law had been laid down in the previous case of *Naragunty Lachmi Davamah* v. *Vengama Naidú* (9 Moo. Ind. Ap. 66), where it is said that the presumption with regard to a Hindú family is that it remains undivided. In another case before the Judicial Committee—*Dharm Das Pandey* v. *Mussamat Shama Sundari Debi* (3 Moo. Ind. Ap. 229)—we find the law laid down which is applicable to the case before us. Their Lordships say:—'It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property. .....' Now, with regard to what their Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family. ..... It was argued before us and reference was made to the case of *Bani Madhab Mukherji* v. *Bhagobati Charan Bannerji* (8 W. R. 270), that it was not shown here that there was any nucleus of property by means of which this acquisition might have been made, and that at least the plaintiffs ought to have given some evidence of that. I must observe that what is said in that case about there being a nucleus of property is only a *dictum*; no doubt

it would be very useful for the plaintiffs to show that, but I cannot agree that they are bound to do it. That *dictum* seems to me to be inconsistent with the doctrine laid down by the Judicial Committee."[1] The question was further discussed in the following cases:—*Bhola Nath Mahta, &c.* v. *Ajúdhya Persad Súkul*, 12 B. L. R. 336; S. C. 20 W. R. 65: *Dinonath Shaw* v. *Harinarain Shaw*, 12 B. L. R. 349: *Gobind Chandra Mukherji* v. *Dúrga Persad Babu*, 14 B. L. R. 349; S. C. 22 W. R. 248. In the second of these cases, *Pontifex, J.* said:—"I must confess that, if I had to give my opinion upon these conflicting authorities as to whom the onus is to be on, I should be inclined to consider that, when property has been purchased by an individual member of a family, it is necessary for those who claim it as joint property to show that there was a nucleus of joint property out of which it could have been purchased. That position has been held by Mitter, J. in *Dhanúkdhári Lal* v. *Ganput Lal* (11 B. L. R. 201); by Phear, J. in *Shiu Gholam Singh* v. *Baran Singh*, and by Jackson and Mitter, JJ. in *Radhika Persad Dey* v. *Mussamat Dharma Dasi Debi* (3 B. L. R. A. C. 124). Otherwise it seems to me that it would be necessary to apply a double presumption, namely, first, that the family was joint; and secondly, that the family was possessed of property." This was however but an *obiter dictum*, as the point was not decided in the case. A family may be joint in mess without being joint in estate. If there be no estate, the family cannot be joint in estate, and there is no fund from which acquisitions can be made. The state of things in respect of which the presumption arises has here no existence: and it may be fairly argued that under such circumstances there is no place for the presumption.

The presumption will not be sufficiently rebutted by evidence that the name of one member of the family only appeared as that of sole owner in revenue records or in other documents relating to the property (*Mussamat Chitha* v. *Mihín Lal*, 11 Moo. Ind. Ap. 369: *Heider Hosen* v. *Muhomed Hosen, &c.* 14 Moo. Ind. Ap. 401: *Mussamat Jasúndah* v. *Ajodhia Persad and others*, 2 Jur. N. S. 261: *Janoki Dasi and others* v. *Krishto Kamal Singh and others*, Marsh Rep. 1)—nor by evidence of separation in mess merely[2] (*Bani Madhab Mukherji* v. *Bhagobati*

[1] The learned Chief Justice further expressed his dissent from the following cases:—*Khilat Chandra Ghose* v. *Kunj Lal Dhar*, 11 B. L. R. 194 note: *Mussamat Suhbadar Dasi* v. *Boloram Dewan*, W. R. Spec. No. 57: *Shiu Gholam Singh* v. *Baran Singh*, 1 B. L. R. A. C. 164: and approved of *Kunjbehari Dutt* v. *Kheternath Dutt*, 8 W. R. 270.

[2] Separation in both dwelling and food may, however, be sufficient to raise the presumption of separation in estate—*Jogan Koer and others* v. *Roghú Nandan Lal Sahu and another*, 10 W. R. Civ. Rul. 148.

Charan Banerji and others, 8 W. R. Civ. Rul. 270): *Mussamat Anandi Kúnwar* v. *Khedú Lal*, 14 Moo. Ind. Ap. 412)—nor, in the case of further acquirements, by mere evidence that the consideration-money passed out of the hands of the member claiming the purchased property as self-acquired without its being shown that the funds were exclusively his own (*Kunj Behari Dutt and another* v. *Kheturnath Dutt and others*, 8 W. R. Civ. Rul. 270). Nor will evidence that several parcels are held in severalty rebut the presumption in respect of the rest of the estate (*Sriram Ghose and others* v. *Srinath Dutt Chaudhri and others*, 7 W. R. Civ. Rul. 451). In *Bodh Singh Dúdhúria* v. *Ganesh Chandra Sen* (12 B. L. R. 326, 327) the status of the family was thus described:—"The evidence of the witnesses and of those members of the family who have been examined, clearly shows that, though the family were joint in food and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindú family in the ordinary sense of the term—that is, as a family having all things in common, all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family." The Privy Council said:—"Such a state of things may, in their Lordships' judgment, be fairly held to weaken, if not all together to rebut, the ordinary presumption of Hindú law as to property in the name of one member of a joint family; and to throw upon those who claim as joint property that of which they have allowed their co-parcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence." Upon the subject of evidence to rebut the presumption, see also *Moro Visvanáth* v. *Ganesh Vithal* (10 Bom. H. C. Rep. 453). It was here suggested that the presumption of union is stronger as between brothers than as between cousins, and the presumption is weaker, the farther from the common ancestor the descent has proceeded.

Endowments made by Hindús for the worship of idols are presumed to be intended to preserve the *sheba* in the family rather than to confer a benefit on an individual: but this presumption may be rebutted by the absence of any language denoting the intention of the donor that the gift should belong to the family, as for example, by the absence of

words of inheritance or of any reference to family or descendants—*Rájá Chandra Nath Rai* v. *Kúer Gobindnath Rai: Collector of Murshedabad* v. *Rani Shebesuri Debya*, 11 B. L. R. 114.

Where an ancient family custom is proved to have existed among Hindús, the presumption is in favour of the continuance of that custom even though the family have migrated (*Sarendranath Rai* v. *Hiramani Barmani*, 1 B. L. R. P. C. 26). In the case of a family who had emigrated from a part of the country governed by the Mitakshara law, it was presumed that they continued to be governed by that law until it was shown that they had adopted the law of their new domicile in Bengal (*Pirthi Singh* v. *Mussamat Sheo Sundari*, 8 W. R. Civ. Rul. 261). This presumption has been held to be sufficiently rebutted by evidence showing that, except as regards marriage, all other ceremonies in the family were performed according to the law of the Bengal school and by Bengal priests (*Ram Bromo Pandah* v. *Kamini Sundari Dasi and others*, 6 W. R. Civ. Rul. 295).

Benami transactions.

The habit of holding land *benami* is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership (*Munshi Bazlúr Rahim* v. *Shamsúnissa Begam*, 11 Moo. Ind. Ap. 602: *Srimati Chandra Dey* v. *Gopal Chandra Chakravartti and others*, 11 Moo. Ind Ap. 28: and see *Mohesh Chandra Bandapadhya* v. *Srimati Barada Debi*, 2 B. L. R. A. C. 275). Under English law, when real estate is purchased by a father *in the name of* his son, a presumption arises that the purchase was intended for the son's advancement,[1] and the son will take the property so purchased. But no such presumption arises under Hindú law: and when immovable property is purchased by a Hindú in the name of his son, the presumption is that it is a *benami* purchase merely, and that the property belongs to the father. If the person in whose name it was purchased alleges that he is solely entitled to the legal and beneficial interest in such property, the burden of proving this will lie upon him (*Gopi Kristo Gosain* v. *Ganga Pershad Gosain*, 6 Moo. Ind. Ap. 53: *Bhagbat Chandra Dey* v. *Haro Gobind Pal, &c.* 20 W. R. 269). In the case of *Brojo Sundari Debya* v. *Lachmi Kunwari, &c.* (20 W. R. 95) the same presumption was applied to a case in which a man purchased property in the name of his own idol, whom no one except himself had the power or right to worship: and it was held that in such a case the property is not the

[1] The doctrine of *advancement* will be found fully treated in *Dyer* v. *Dyer*, *I Leading Cases in Equity*, 184, and in *Story's Equity Jurisprudence*, §§ 1202—1205.

property of the idol but of the person who purchased it. It might be otherwise if the idol were set up for public worship, and if there was clearly an endowment for the benefit of the public. The same principle applies in the case of Muhammedans and of a purchase made by a Muhammedan father in the name of a son (*Mulvi Syud Azhar Ali* v. *Mussamat Bibi Altaf Fatima*, 13 Moo. Ind. Ap. 232), or in the name of his wife (*Rani Súrnamayi* v. *Lachmipat Dúgar and others*, 9 W. R. Civ. Rul. F. B. 338). The presumption that the purchase was an ordinary *benami* one may be rebutted by evidence showing that the father's object was to affect the ordinary rule of succession as from him to the property purchased (*Rahna Daula Nawab Ahmed Ali Khan* v. *Hardwari Mull*, 5 B. L. R. 578; S. C. 13 Moo. Ind. Ap. 401). It was also here laid down, that when *bonâ fide* creditors seek to render liable property of which their debtor is the ostensible owner, it is the duty of a Court of Justice to put those, who object on the ground that he only held *benami*, to strict proof of such objection. It may be observed that the usual mode of proving a purchase to be a *benami* one is to show that the funds with which the purchase was made, were exclusively the funds of the person alleged to be the real owner of the property (*Gopi Krishto Gosain* v. *Ganga Pershad Gosain*, 6 Moo. Ind. Ap. 53: *Mulvi Syud Azhar Ali* v. *Mussamat Bibi Altafi Fatima*, 13 Moo. Ind. Ap. 232).

Doctrine of Satisfaction.

According to English law, as administered in Courts of Equity, if a person being indebted to another in a sum of money, give him by will a sum as great as, or greater than the debt without taking any notice or making mention of the debt, such bequest shall nevertheless be in satisfaction of the debt, so that the creditor shall not have both the debt and the legacy—*Debitor non presumitur donare*.[1] This presumption has been followed in India, and when a Muhammedan husband, who had agreed to give his wife a dower of five lakhs of Lucknow rupees, subsequently directed four and-a-half lakhs sicca rupees of Company's paper to be set aside for her, this was presumed to be in satisfaction of dower and not a gift (*Iftikarannissa Begum* v. *Nawab Amjad Ali Khan*, &c. (Privy Council), 7 B. L. R. 643). The Indian Succession Act does not follow the doctrine of satisfaction as administered by Courts of Equity. When a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor is entitled both to the legacy and to the amount of the debt (sec-

[1] The doctrine of *satisfaction* will be found fully treated in *Ex parte Pye*, 2 *Leading Cases in Equity*, 331.

tion 164, Act X of 1865). When a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion (section 165, *idem*). No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee (section 166, *idem*). As to the presumption of English Law that a gift made under certain circumstances is a *donatio mortis causâ* being inapplicable to *Hindús*, see *Kumara Upendra Krishna Deb Bahadúr* v. *Nabin Krishna Bose*, 3 B. L. R. O. C. 121.

Presumptions as to Land.

The hereditary nature of a tenure or *talúk* may be presumed from evidence of long and uninterrupted enjoyment and of the descent of the tenure from father to son, notwithstanding the absence of "words of inheritance" in the instrument by which the tenure was originally created (*Babú Gopal Lal Takúr* v. *Teluk Chandra Rai*, 10 Moo. Ind. Ap. 191: *Babu Dhanpat Singh* v. *Guman Singh*, 11 Moo. Ind. Ap. 465: *Rájá Sattasarran Ghosal* v. *Mohesh Chandra Mitra*, 11 Moo. Ind. Ap. 268: *Kúldip Narain Singh* v. *The Government, &c.* 14 Moo. Ind. Ap. 247; S. C. 11 B. L. R. 71: *Nabo Dúrga Dasí* v. *Dwarkanath Rai, &c.* 24 W. R. 301: *Karunakar Mahati* v. *Niladhro Chaudhrí*, 5 B. L. R. 655: *Massamat Lakhú Kowar* v. *Rai Harí Krishna Singh*, 3 B. L. R. A. C. 227 (the words "*muharrarí istemrárí*" create an hereditary right in perpetuity): *Brajanath Kundú Chaudhrí and others* v. *Lakhí Narain Addi*, 7 B. L. R. 211 (*maurasí* or inheritable title presumed from continuous payment of rent for more than a hundred years). "In England, proof of the possession of land or of the receipt of rent from the person in possession is *primâ facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land revenue to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir" (*Collector of Trichinopoly* v. *Lekamani*, 14 B. L. R. 139; S. C. L. R. 1 I. A. 283). The general presumption is in favour of the liability of land to assessment, and the claimant of *lakheraj* must establish his claim not by inferences and presumptions, but by the positive proof required by the Regulations (*Maharájá Dheraj Rájá Matab Chand Bahadúr* v. *The Bengal Government*, 4 Moo. Ind. Ap. 497: but see *ante*, pp. 450-452). A *zemindar* has as such a *primâ facie* title to the gross collections of all the *mauzas* or villages within his *zemindárí*, and the burden of proof is

upon those who seek to defeat that right by proving the grant of an intermediate tenure (*Rájá Sahib Prahlad Sen* v. *Durga Persad Tewari*, 12 Moo. Ind. Ap. 331; S. C. 2 B. L. R. P. C. 134). A purchaser at a sale for arrears of Government revenue "is remitted to all the rights which the original settler at the date of the perpetual settlement had; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date. In the assertion of this right the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption and by virtue thereof to throw the burden of proof on his opponent. That presumption, however, is founded not so much upon the principle just mentioned, as upon the principle that every bigha of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable until the contrary be shown. Accordingly, in many cases, which may be found in the books, a very heavy burden of proof has been placed upon the defendants whose tenures have been questioned by auction-purchasers: and they have had to prove in circumstances of great difficulty that their tenure did really exist at the date of the perpetual settlement or even twelve years before, in order to escape the consequences of the claim. It is, however, to be observed that the course of modern legislation and also of modern decision has, if not in the case of *lakheraj* lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases by giving force to the contrary presumptions arising from proof of long and undisturbed possession" (*Forbes* v. *Mir Mahomed Hosen*, 12 B. L. R. 215; S. C. 20 W. R. 44). A suit to enhance rent proceeds on the presumption that a zemindar holding under the *perpetual settlement* has the right, from time to time, to raise the rents of all the rent-paying lands within his *zemindári*, according to the *pargána* or current rates, unless either he is precluded from the exercise of that right by a contract binding him, or the lands in question can be brought within one of the exemptions recognized by Bengal Regulation VIII of 1793; and it also assumes that the defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit. The effect of this presumption, before the passing of Act X of 1859 (which has considerably altered the question) was to relieve the plaintiff, zemindar, in a suit for enhancement from much of the burden of proof which would have lain on him in an ordinary suit (*Bama Sundari Dasi* v. *Radhika Chaudhrain*, 13 Moo. Ind. Ap. 262).

Title is to be presumed from lawful possession, until the want of title or a better title be proved (*Rájá Haimun Chull Singh* v. *Kumar Gunsheam Singh*, Suth. Priv. Coun. Ap. 4 : *Rájá Pedda Vencatapa Naidú Bahadúr* v. *Arúvala Rudrapa Naidú and another*, *idem.* 112 : *Baradakant Rai* v. *Chandra Kumar Rai and others*, 12 Moo. Ind. Ap. 225 ; S. C. 2 B. L. R. P. C. 1 (*bil* or marsh situate between two *zemindáris*, the proprietor of which owned the fisheries in the *bil*, and continued to own them after the sale of one of the *zemindáris*, the purchaser of which claimed certain land reclaimed from the *bil*, but it was held to belong to the former proprietor who had continued in possession of the fisheries) : *Trilochan Ghose and others* v. *Kailas Nath Sidhanto Bhaumik Bhattacharjya*, 3 B. L. R. A. C. 298 : *Selam Sheikh* v. *Beidonath Ghatak*, 3 B. L. R. A. C. 312 : *Kali Chandra Sen and others* v. *Adú Sheikh and others*, 9 W. R. Civ. Rul. 602 : *Amirunissa Begam* v. *Umar Khan*, 8 B. L. R. 541 (adverse possession, which bars the remedy, extinguishes the right ; see now section 28 of the Limitation Act, XV of 1877) : *Khájá Asanúla* v. *Obhei Chandra Rai*, 13 Moo. Ind. Ap. 318 (continued possession of a tenure, which could have been avoided by the purchaser at a sale for arrears of Government revenue) : and see section 110 of the Evidence Act, *ante*. When a tenant under a lease having a term holds over after the expiry of the term, he is presumed to hold subject to all the conditions of the lease which are applicable to his new position. When the tenant of a house in Calcutta continued to hold after the expiry of a three years' term, it was decided that he held merely from month to month, and that the tenancy was terminable by a month's notice (*Nokúr Das Mullick* v. *Jeoraj Babu*, 12 B. L. R. 263). When payment of the rent of a particular year is admitted or proved, there is a presumption that the rent of previous years has been paid, unless the contrary be shown (*Rani Súrath Súndari Debi* v. *K. Brodie*, 1 W. R. Civ. Rul. 274 : *Rájá Enayat Hosen* v. *Sheikh Didar Baksh*, W. R. Jan.—July 1864, Act X Rul. 97 : *Takúr Mitterjit Singh* v. *Choker Narain Singh*, 2 W. R. Civ. Rul. 58). When mortgagees in possession refuse to produce their accounts, every reasonable presumption may be made against them and in favour of the mortgagors as to the amount realized from the property. But even such a presumption *in odium spoliatoris* must have reasonable limits (see an example of such reasonable limits in *Shah Makhan Lal* v. *Sri Krishna Singh*, 2 B. L. R. P. C. 58 ; S. C. 12 Moo. Ind. Ap. 198). In connection with the presumption proper to be made from the fact of evidence being withheld

Presumption of title from possession.

the following observations of their Lordships of the Privy Council in the case of *Bama Sundari Dasi* v. *Radhika Chaudhrain* (13 Moo. Ind. Ap. 269) may also be quoted—"Their Lordships have further to observe that, if the respondent's case were a true one, she should have had little difficulty in proving it. She does not come into Court as the purchaser at a sale for arrears of revenue, who rests upon a statutory title with no documents to support it. She derives title from the *zemindar* with whom the Decennial Settlement was effected; and she has presumably a right of access to all the records of the *zemindári*. Her determination in such circumstances to rest upon the supposed defects in the appellant's proof, and to abstain from giving evidence of the truth of her own case, affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage."

"The true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is, that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law, and it is a rule which is supported by reason and principle. In India, where there is a great deal of waste land and where quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application, namely, that if an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful" (*Gúrú Das Rai* v. *Issur Chandra Bose*, 22 W. R. 246).

Presumption as to Legitimacy among Muhammedans.

Muhammedan law raises a strong presumption in favour of legitimacy. Where a child has been born to a father, of a mother with whom there has not been a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammedan law, the presumption is in favour of such a marriage having taken place (*Khája Hidayatúla* v. *Rai Jan Khanum*, 3 Moo. Ind. Ap. 295). This case was referred to in *Ashrafúd Daula Ahmed Hosein Khan Bahadúr and another* v. *Heider Hosein Khan* (11 Moo. Ind. Ap. 94) as deciding that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment suffice to prove legitimacy; and it was pointed out that mere continued cohabitation alone will not

suffice to raise such a legal presumption of marriage as to legitimatize the offspring, unless it be accompanied with acknowledgment, or conduct equivalent to acknowledgment. "The binding decisions on this subject," it was said, "must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption" as that, "mere continued cohabitation alone suffices to raise such a legal presumption of marriage as to legitimatize the offspring." "The presumption of legitimacy from marriage *follows the bed*, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed and is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubinage may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumption of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proof, whether direct or presumptive." In *Khajúrúnissa* v. *Ranshan Jahan* (I. R. R. 2 Calc. 199) the legitimacy was presumed of a son, who, though not recognized by his father on any particular occasions, was always treated on the same footing as the other legitimate sons. "This of itself," said the Privy Council, "appears to their Lordships to raise some presumption that his mother was his father's wife." In the case of *Muhammed Bakhir Hosein Khan* v. *Sharfanissa Begam* (8 Moo. Ind. Ap. 159) the same principles were applied, and it was held that under the circumstances of the particular case the presumption of legitimacy was not justified. But, while arriving at this conclusion in that particular case, their Lordships guarded their judgment by saying that they wished to be distinctly understood as not denying or questioning the position that, according to Muhammedan law, the legitimacy or legitimation of a child of Muhammedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation.

Marriage between Hindús in different subdivisions of the Sudra caste being prohibited and being possible only when sanctioned by special custom, no presumption as to the validity of such a marriage can be made from long cohabitation in the absence of proof of such special custom (*Narain Dhara* v. *Rakhal Gain*, I. L. R. 1 Calc. 1). It is a maxim of Hindú law in cases of adoption that 'permission is to be presumed in the absence of prohibition,' but this maxim relates to the person who gives, not to the person who receives, a child in adoption (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi* and *Anand Chandra Chaudhri and another* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. 145). There is a presumption in Calcutta that where a vendor of goods deals with a *banian* of an European firm, *quâ* banian, the principal does not incur any liability whatever, and the vendor so dealing can look to the banian only for the price (*Sheikh Faizúla* v. *Ram Kamal Mitter*, 2 B. L. R. O. C. 7). Where bills are produced by the acceptor after due date, and the drawer has received no notice of dishonor and no demand for the payment of such bills, the presumption is that they have been paid by the acceptor (*Shearman* v. *Fleming and others*, 5 B. L. R. 619). In a suit for damages for a malicious prosecution, malice may be inferred from the absence of reasonable cause (*Ganga Persad* v. *Ramphul Sahú*, 20 W. R. 177). Delay in suing to enforce his rights raises a presumption unfavourable to the person who makes such delay. A and B, two reparian proprietors, were disputing about a *chur*. A was put in possession by the Magistrate in 1836, B did not sue to assert his rights till 1847. The Privy Council said:—"Their Lordships are of opinion that no sufficient explanation had been given for the very long delay on the part of the plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time" (*Sham Chand Beishakh* v. *Kissen Persad Surma*, 14 Moo. Ind. Ap. 600). A Muhammedan widow was in possession of her husband's estate, which she claimed to hold, one-fourth by right of inheritance, and the rest on account of dower. She alleged her dower to be Rs. 40,000. The heirs of the remaining three-fourths, having the fullest notice of her pretension to hold the estate for her dower, took no step to dispute her claims, or disturb her possession for nearly ten years. "The proper inference from this conduct," said the Privy Council, "is that they were aware that she had a claim to a large dower, certainly to an amount far beyond the in-

Some other cases.

§115 Estoppel by conduct — see page 508.
Hardeo Baksh v Jawahir Singh L.R. 6 I.A. 161 (Oudh Talookdar held to have consented by his action to hold the estate in trust).
Ram Dial v Mahtab Singh & Ishr 3 All 701; Beera Ram v Ali Baksh Ishr 3 All 805 (Privy in title)

significant sum of 500 dirms which they now set up and which must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower.* Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained, they might at any time have instituted a suit to obtain possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying on that very difficulty. Whilst the Judges of the High Court treat this conduct of the respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference which we think may fairly be done, that it is also indicative of a consciousness on their parts that what the appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim (*Mussamat Bibi Bachan* v. *Sheikh Hamid Hosen*, 10 B. L. R. 54). No adverse presumption arises against a person who refuses to withdraw his case from the decision of the Court and submit it to arbitration (*Mohabir Singh, &c.* v. *Dhujjú Singh*, 20 W. R. 172). An indefinite or general hiring in India does not mean a hiring for a year certain, as it does in England, nor is the mere payment of wages monthly sufficient to raise a presumption that a hiring is a monthly hiring (*P. F. Hughes* v. *The Secretary of State for India in Council*, 7 B. L. R. 689). The return to a writ of *habeas corpus* is not necessarily conclusive and does not preclude inquiry into the truth of the matters alleged therein, although the 56 Geo. III, Cap. 100, which allows affidavits to be used to contradict the return in criminal matters, does not extend to India (*In the matter of Khatija Bibi*, 5 B. L. R. 557: *sed—contra*, *The Queen* v. *Vaughan and another*, 5 B. L. R. 418). It may be observed that the writ of *habeas corpus* cannot now be issued by the High Courts beyond the Presidency towns—see section 82 of the Code of Criminal Procedure, Act X of 1872.]

CHAPTER VIII.—ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall

be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

[" An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Mr. Smith in his note to the Duchess of Kingston's case characterizes this definition as *a little startling*, but it nevertheless gives a good idea of what it is by no means easy to include within the limits of a definition. In *Rani Mewa Kuwar* v. *Rání Hulas Kuwar* (L. R. 1 I. A. 161; S. C. 11 B. L. R. 312) the Privy Council said that those who rely upon a document as an estoppel—the *nature of an estoppel being to exclude an inquiry by evidence into the truth*—must clearly establish that it does amount to that which they assert. Lord Coke divided estoppels into three kinds, and this division has been usually followed by those who have since treated the subject—*viz.* 1st, by matter of record; 2nd, by deed; 3rd, *in pais*. Estoppel by matter of record[1] is chiefly concerned with the admissibility and effect of judgments. This portion of the subject has been already disposed of (sections 40—44, *ante*). The authors of the Evidence Act have not regarded it as a branch of the subject of *estoppels*. With respect to *estoppels by deed*, Indian law does not recognize out of the Presidency towns the division of contracts into those not under seal termed *simple contracts* and those under seal termed *deeds* or *specialities*: and even in the Presidency

Meaning of Estoppel.

Division of Estoppels.

[1] In connection with this subject, the following case may be noticed. The Calcutta High Court confined its decision in a case to a single point at the instance of the appellant's counsel, an undertaking being given that no appeal should be preferred to the Privy Council. An appeal was preferred nevertheless; but the High Court having certified the undertaking on the record, the Privy Council held that such undertaking precluded an appeal (*Munshi Amir Ali* v. *Maharani Inderjit Singh*, 14 Moo. Ind. Ap. 203).

towns the distinction is not recognized where a Hindú or Muhammedan is the defendant (*Ram Gopal Law* v. *Richard Blaquiere*, 1 B. L. R. O. C. 37). The principle that a man cannot be allowed to dispute the contents of a *deed*, a solemn instrument to which he has set his hand and seal, has therefore but little application in India, such application being limited to a portion of the community in the Presidency towns (*Zemindár Srí Motí Gaurevallaba Ram Chandra* v. *Verappa Cheti*, 2 Mad. Rep. 124), and having no application in the Mufassil (*Kedarnath Chakravartti* v. *Donzelle*, 20 W. R. 353). The instances given by Lord Coke of *estoppels in pais* are:—by matter *in pais*,[1] as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate. The inclination of the Courts has been to extend the principle of *estoppel in pais*, more especially in mercantile transactions, in which men must of necessity trust much to appearances and to the representations of others. The principle was thus stated by Lord Denman in *Pickard* v. *Sears*:[2]—"The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Freeman* v. *Cook*,[3] Baron Park said that the rule laid down in *Pickard* v. *Sears* "was to be considered as established; but that by the term 'wilfully' in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth: and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect; as for instance, a retiring partner omitting to inform his customers of the firm in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them

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[1] *In pais* means "in the country," "before the public." Trial *in pais* is trial *by the country*, i. e. by a jury. Conveyances *in pais* are ordinary conveyances between two or more persons *in the country*, i. e. upon the land to be transferred.

[2] 6 Adolphus and Ellis's Reports, 475.

[3] 2 Ex. Ch. 654.

with third persons, on the faith of their being authorized."[1] "If a man," writes Mr. Justice Story, "having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by and being silent will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase. So, if a man should stand by, and see another person as grantor execute a deed-of-conveyance of land belonging to himself, and knowing the facts should sign his name as a witness, he would in equity be bound by the conveyance. So, if a party having a title to an estate should stand by, and allow an innocent purchaser to expend money upon the estate, without giving him notice, he would not be permitted by a Court of Equity to assert that title against such purchaser, at least, not without fully indemnifying him for all his expenditures. The same rule has been applied both at law and in equity, where the owner of chattels, with a full knowledge of his own title, has permitted another person to deal with these chattels as his own in his transactions with third persons, who have bargained and acted in the confidence that the chattels were the property of the person with whom they dealt, for in cases where one of two innocent persons must suffer a loss, *à fortiori* in cases where one has misled the other, he, who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it" (§ 385).[2] In *Carr* v. *London and North-Western Railway Company* (L. R. 10 C. P. 307) four *recognized propositions* of an estoppel *in pais* were enunciated by the Court, which said:—"One such proposition is if a man *by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false*, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."

"Another recognized proposition seems to be that if a man, *either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way*, and it be acted upon in that way, in the belief of the

[1] The English cases will be found collected in Mr. Smith's note to the Duchess of Kingston's case (second volume of Leading Cases); and in Mr. Taylor's Work on Evidence, § 769 and following paras. They have been referred to above only so far as was sufficient to illustrate and explain the principle discussed.

[2] See also note to section 31, *ante*.

existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

"And another proposition is that, if a man, *whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way*, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

"There is yet another proposition as to estoppel. *If in the transaction itself, which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result*, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

In *Swan* v. *N. B. Australasian Company* (2 H. & C. 175) Blackburn, J. said that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.

It is with estoppels of this class that Chapter VIII of the Indian Evidence Act is concerned; and the principle involved is one which has long been recognized and acted upon by the Courts in India. English writers sometimes classify these estoppels, as estoppels by statement, estoppels by conduct, and estoppels by negligence; and this classification has been substantially followed in the above section:—"When one person has, by his (1) declaration, (2) act, or (3) omission, intentionally caused, &c." The following are instances of estoppels by declaration or statement:—A person, who held a mortgage of certain property as security for a loan, represented to an intending purchaser of this property, that he had no security over it and induced him under that belief to buy. It was held that he could not subsequently put his mortgage in force as against that purchaser (*Mannú Lal* v. *Lalla Chúní Lall*, L. R. 1 I. A. 144). A person wilfully made a false statement as to the value of certain horses, in order to

Principle of estoppel long acted upon in India.

Estoppels by Declaration.

induce a Railway Company to carry them at a lower rate of freight, and it was decided that he was thereby estopped from proving their real and greater value in an action against the Company for their loss (*M'Cance* v. *The London and North-Western Railway Company*, 7 H. & N. 447). Three estates, K, S, and P, were mortgaged by A to B as a security for a loan. Another person obtained a money decree against A. B purchased this decree, and in execution thereof brought the village K to sale. At the sale he gave out to the world of buyers that he intended to burthen K with *the whole sum* due to him. The bidding was in consequence very low, and he purchased for Rs. 950, the real value of K being Rs. 20,000. B subsequently sued on the mortgage bond to recover Rs. 12,212, principal and interest. It was held, that his purchase of K under the above circumstances precluded him from recovering in this suit (*Beijonath Sahai* v. *Dulhan Biswanath Koer*, 24 W. R. 83).

Estoppels by Conduct.

Estoppels by conduct are by far the most numerous, and very many instances are to be found in cases arising in India. When the real owner of immovable property allowed another person (the *benamí* purchaser) to hold himself out to the world as the actual proprietor and so to induce parties ignorant of the real state of things to lend money on the security of the property, he was held not to be entitled to any consideration from the Court, and was not permitted, on showing the actual state of the case, to recover the sale-proceeds of the property (when sold for arrears of revenue), which, in execution of a decree against the *benamí* holder, the creditor had taken out of the Collector's Treasury (*Nanda Lal* v. *W. Tayler and others*, 1 Jur. N. S. 55: *Bama Súndarí Debya* v. *Rashmaní Debya*, 4 W. R. Civ. Rul. 36).

Benamí Transactions.

Certain landed property was attached in execution as belonging to A, upon which B, his mother, and C, his brother's widow, came forward and claimed the property as their own, in consequence of which it was released from attachment. B and C were afterwards allowed to hold themselves out to the world as the real owners of the property, and they disposed of it by sale and otherwise, without objection from A, to persons who transferred to D. After A's death, his widow sold a portion of the property to E. In a suit by D for confirmation of his possession, it was held that D, as a vendee for valuable consideration deriving title from the ostensible owners of the property, was entitled to protectiom from the subsequent acts of the real owner and his heirs, both of whom were found to be parties to the fraud (*L. Rennie* v. *Ganga Narain Chaudhrí*, 3 W. R. Civ. Rul. 10). A was the real owner of certain

property, but suffered B to hold *benamí* and to appear to the world as the real owner. B stood by, while C acting as owner made a mortgage of the property. B also became a witness to the mortgage-deed. A afterwards sued to recover the property, alleging that B had perpetrated a fraud on him. He was held bound by B's conduct, as his own acts had led to the fraud, inasmuch as he had allowed B to be the ostensible owner (*Brojonath Ghose* v. *Kailas Chandra Banerji*, 9 W. R. Civ. Rul. 593: see also *Nidhí Singh* v. *Bissonath Das, &c.* 24 W. R. 79; and *Saral Narain Chaudhrí, &c.* v. *Sheo Gobind Panday, &c.* 11 B. L. R. App. 29). Where property has been transferred or otherwise disposed of *benamí* in fraud of creditors, the real owner or his representatives, private purchasers as well as heirs, will not be permitted to come into Court alleging the fraud and succeed in having the transfer or other disposition of the property set aside (*Lakhí Narain Chackravartti* v. *Taramaní Dasí and others*, 3 W. R. Civ. Rul. 92 (suit to set aside a *mukarrarí* lease created *benamí* in fraud of creditors): *Parikhit Sahú* v. *Radha Kissen Sahú and others*, 3 W. R. Civ. Rul. 221 (*benamí* conveyance with same object): *Bhawani Persad and others* v. *Ahidan and another*, 5 W. R. Civ. Rul. 177 (*benamí* transfer to wife): *Raushan Bibí* v. *Sheikh Karím Baksh and others*, 4 W. R. Civ. Rul. 12 (suit by heirs to obtain property transferred to wife for fraudulent purpose): *Rattan Dayí* v. *Rai Gauri Sankar*, 4 W. R. Civ. Rul. 72: *Bhagwan Das* v. *Apúch Singh and others*, 10 W. R. Civ. Rul. 185 (real owner placing *indicia* of ownership in the hands of another, bound by alienation made by the latter, unless he can show that alienation was made without his acquiescence and that alienee took with notice of such fact): *Bani Persad and others* v. *Maun Singh*, 8 W. R. Civ. Rul. 67: *Hari Sankar Múkhapadhya* v. *Kalí Kúmar Mukhapadhya and others*, Legal Remembrancer, July 1864, p. 43: *Mohant Raghúbar Dyal Puri* v. *Maharájá Kunwar Babu Mohendro Kishore Singh Bahadur*, *id.* p. 78. In *Ram Kumar Kúndú* v. *John and Maria McQueen* (11 B. L. R. 53) the Privy Council said:—"It is a principle of natural equity which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it." In *Ram Persad and others* v. *Shiva Persad and*

others (1 N.-W.-P. Rep. 71) fictitious sales of certain property had been executed in favour of persons residing in foreign territory in order to evade process for the recovery of arrears of revenue. The Revenue authorities assumed the management of the property, farmed it, paid off all arrears, and restored possession to the real owners. In a suit by the vendee under the fictitious sale to recover possession, it was held that the maxim '*In pari delicto potior est conditio possidentis et defendentis*' applied, although the real owner after passing the property by a fictitious sale could not come into Court to recover it: and that the case was also within the rule that relief will be granted where public policy will be promoted, the public policy here being the policy which Government through the Revenue authorities had decided to be best for the estate. Where land or other immovable property has been sold in execution of a decree (see section 260 of Act VIII of 1859 and section 317 of Act X of 1877) or for arrears of Government revenue (see section 36 of Act XI of 1859 and section 184 of Act XIX of 1873), the law will not allow a stranger to claim the property on the ground that the certified purchaser merely purchased *benami* on his account; and any suit brought on such an allegation must be dismissed with costs.

Other cases of estoppel by conduct.

A, having fabricated a deed-of-sale to himself of certain property of his brothers, was thereby enabled to appear as owner of the property and deceive B, to whom he conveyed it for full consideration. The deed-of-sale to A was set aside as fraudulent. A on the death of his brother succeeded to his rights by inheritance. A's heir subsequently sued to recover the property conveyed to B: but it was held that A's heir could not do what A himself would not be allowed to do; that A claiming as heir to his brother could not set up his own fraud and forgery against B whom he had deceived thereby; and that the case came within the well-known rule of law that where a person by his own solemn and deliberate act wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he is conclusively bound by the representation so made and will never be allowed to contradict it to the prejudice of the other" (*Múnshi Syud Amir Ali* v. *Syef Ali*, 5 W. R. Civ. Rul. 289: see also *Babú Radhakissen* v. *Mussamat Sharifunnissa*, W. R. Jan.—July 1864, Civ. Rul. 11). A decree was passed for the payment of a certain sum of money without interest. Afterwards the decree-holder and the judgment-debtor filed a *kistbandi*, agreeing that the amount of the decree should be paid by instalments with interest, and the judgment-debtor by his conduct for several years treated this *kistbandi* as if it

were the decree. It was held that he could not afterwards object that the *kistbandi* could not be executed as a decree and that a fresh suit must be brought thereupon [1] (*Dinnonath Sen* v. *Gúrú Charan Pal*, 14 B. L. R. 287; S. C. 21 W. R. 310). The notification of property for sale in execution of a decree stated the Government revenue to be Rs. 3,146 instead of Rs. 8,146. The judgment-debtor applied to the Court for a postponement of the sale. "Under such circumstances it is prayed that a postponement of one month be granted, *the attachment and the notification of sale being maintained.*" It was held that this petition amounted to an admission that there was no mistake or irregularity likely to mislead, and that the judgment-debtor could not afterwards take advantage of the above mistake in order to have the sale set aside (*Girdhari Singh* v. *Hurdeo Narain Singh*, *&c.* L. R. 3 I. A. 230). When parties allow a suit to be conducted in the Lower Courts as if a certain fact was admitted, they cannot afterwards in a special appeal question it and recede from the tacit admission (*Mohima Chandra Rai Chaudhri* v. *Ram Kisshore Acharji Chaudhri*, 15 B. L. R. 155; S. C. 23 W. R. 174: *Devaji Gayaji* v. *Godadbhai Godebhai*, 2 Bom. H. C. Rep. 28: *Harihar Mukherji* v. *Raj Kissen Mukherji*, 23 W. R. 251). Where a defendant made no objection at the time to the purchaser of the plaintiff's interest in the suit substituting his name on the record for that of the plaintiff, he was not afterwards allowed to contend that the suit had thereby abated (*Bir Chandra Rai Mahapatar* v. *Bansi Dhar Rai Mahapatar and others*, 3 B. L. R. A. C. 214). A purchased certain property at a sheriff's sale and again conveyed to B. Neither A nor B made any attempt for eleven years to assert their right to the property, or gave any intimation of their purchase to C, who was in possession. C sold to D without any remonstrance from them either before or after the sale. In a suit by the assignee of B to obtain possession of the property, it was held that A and B, having allowed C to retain all the *indicia* of ownership, having wilfully and designedly kept him in ignorance of their rights, and having looked on in silence while he was innocently

[1] Whether a decree could be altered by consent of parties was a question upon which there was some conflict of opinion. Now under section 210 of the new Code of Civil Procedure, after a decree has been passed, the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that the amount decreed be *paid by instalments* on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him or otherwise, as it thinks fit. *Save* as thus provided or for the correction of a variance between the decree and judgment, or a clerical or arithmetical error, no decree can be altered at the request of parties.

selling to a purchaser for valuable consideration, were estopped by this conduct from asserting their rights against that purchaser, and that their assignee was in the same position as they were (*Mohesh Chandra Chatterji* v. *Issur Chandra Chatterji*, 1 Jur. N. S. 266). A's wife by a *kabala* sold a portion of certain property to B, and agreed if she sold the rest to sell it to B. A consented to and was a witness of the *kabala*. After the death of his wife, A sold the rest of the property to another person. In a suit by B to set aside this sale and enforce his right of pre-emption, it was held that A was bound by the agreement contained in the *kabala* (*Kalinath Raí* v. *Bhúbanesúri Dasi*, Sev. Rep. July—Dec. 1864, p. 207). An offer of sale was made to a person having a right of pre-emption, but he refused it and consented to a sale to a stranger. It was held that he could not afterwards set up his right of pre-emption (*Braja Kishore Surma* v. *Kirtí Chandra Surma*, 7 B. L. R. 19). A Hindú mother sold a portion of the property during the minority of her son. Eleven months after attaining his majority, this son signed on behalf of his mother a written defence in a suit brought by the purchaser to obtain possession of the property and in which she was a defendant *pro formâ*; and he took an active share in conducting her defence. It was held that he was estopped by this conduct, when he subsequently sued to set aside the sale as made without necessity therefor[1] (*Kebal Krishto Dass* v. *Ram Kúmar Saha*, 9 W. R. Civ. Rul. 571). An adopted son sued his adopted father's brother for partition of the family property. The latter disputed the adoption, but it was decided that he was estopped from doing so, as he had actively participated in the adoption, had by many acts signified to his brother and the plaintiff his complete acquiescence therein, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, had allowed his brother to die in the belief that the adoption was valid, and finally had concurred in the performance by the plaintiff of the funeral ceremonies of the deceased (*Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate, &c.* 11 Bom. H. C. Rep 190). If a man grant a lease of land in which he has no legal interest, he cannot afterwards deny the validity of this lease if he come to have an interest in the land, and the lease will take effect accordingly. If the lessor, at the time of making the lease, have an interest, it is a rule of English Com-

[1] As to the duty of a Hindú minor on coming of age to make himself acquainted with what was done during his minority by the managing member and the effect of his silent acquiescence for several years, see *Gopal Narain Mazimdar* v. *Madomati Gupti*, 14 B. L. R. 32.

mon Law that such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant. Equity would, however, more especially if the lease were made for a valuable consideration, oblige the lessor to make good the term out of the interest he had acquired.[1] Where a person having a limited interest, namely, a sublease, granted a perpetual lease on consideration of Rs. 2,000, and afterwards acquired the proprietary right, he was held to be estopped from disputing the perpetual lease (*Karan Chaubi* v. *Janki Persad*, 1 N.-W.-P. Rep. 165). Where a person, having a mortgage of certain property, assisted the owner thereof in borrowing money on the security of the same property, as if it were unincumbered, and, neither during the negotiation nor at the time of paying over the money so borrowed, communicated the fact of his own lien, it was held that by such conduct he lost the priority which his mortgage otherwise would have had, and that his claims must be postponed to those of the subsequent mortgagee[2] (*Rai Sita Ram* v. *Kissen Das*, alias *Kishnarain*, 5 N.-W.-P. Rep. 402). With this case compare *Salamat Ali, &c.* v. *Budh Singh, &c.* I. L. R. 1 All. 303. The master of a vessel signed a bill of lading which stated that four casks were marked with the word "Calcutta" as the port of destination. In an action for damages for landing the casks at Colombo, it was held that the master was estopped from saying that they were not marked with the word "Calcutta" (*Madhab Chandra Dey* v. *Law*, 13 B. L. R. 394). Under the provisions of section 237 of the Indian Contract Act, IX of 1872, when an agent has without authority done acts or incurred obligations to third persons on behalf of his principal, the latter is bound, if he has by his words or his conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority (see also section 238). Section 245 of the same Act enacts that a person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm. Section 246 further provides that any one consenting to allow himself to be represented as a partner, is liable as such to third persons who on the faith thereof give credit to the partnership. See also section 164, *post*.

Some provisions of the Indian Contract Act.

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[1] See *Williams on the Law of Real Property*, 6th ed. p. 358; *Story's Equity Jurisprudence*, § 387, and following paras.; and *Syud Amir Ali, &c.* v. *Hira Singh, &c.* 20 W. R. 291.

[2] See *Story's Equity Jurisprudence*, § 390.

As to estoppels by omission or negligence, the remark of Mr. Justice Blackburn (*ante*, p. 505) may well be borne in mind. A person left with his wife cheques ready signed, but not having the amounts filled in. She filled up one so imperfectly as to enable the bearer to alter £50 into £350; and it was decided that the husband was estopped from setting up against the banker, who had acted with ordinary caution in paying the cheque in the usual course of business, that his agent had only drawn the cheque for the smaller sum, inasmuch as it was his negligence, through his agent, that enabled the fraudulent holder to cheat the banker (*Young* v. *Grote*, 4 Bing. 254; S. C. 12 J. B. Moore, 484). A claimed under a mortgage which was neither registered, nor accompanied by possession. B claimed under a later mortgage, which was registered and accompanied by possession, and had no notice of A's mortgage. A sued the mortgagor for a sum of money unconnected with the mortgage, obtained a decree, and in execution thereof brought the mortgaged property to sale, but at the time of the sale gave no notice of his mortgage. B purchased the property. A subsequently sued to enforce his mortgage lien upon the property, but he was held to be estopped from doing so, as he had omitted to give notice of his mortgage to B when bidding for the property (*Tukáram Bin Atmáram* v. *Rám Chandra Bin Budharam*, I. L. R. 1 Bom. 314). A, in execution of a money-decree, brought to sale the right, title, and interest of B in certain property; but he gave no notice that this property had been mortgaged to him, and that his mortgage-lien was in existence at the time of the sale. C became the purchaser. A afterwards obtained a decree on the mortgage-bond and assigned this decree, in execution of which the assignee attached the same property. C, having claimed without success under section 246 of Act VIII of 1859, brought a regular suit to establish his absolute title. It was held that, as A had suppressed the fact of his charge on the property and so had induced C to purchase, he was precluded from afterwards setting up the mortgage-lien, and that A's assignee could not do what A himself would not be allowed to do (*Dullab Sarkar and another* v. *Krishna Kumar Bakshi*, 3 B. L. R. A. C. 407).

Estoppels by Omission.

It will be useful to notice some cases in which there was held to be no estoppel. A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position to his own detriment (*Girish Chandra Ghose* v. *Iswar Chandra Mukherji and others*, 3 B. L. R. A. C. 337: *Karali Charan Banerji* v. *Maharáji Dhiráj Mahtab Chandra Bahadur*, Sev. Rep. July—Dec.

Cases in which no estoppel.

1864, 29). A Hindú widow, who had inherited as heiress of her husband, sold a portion of the property by an instrument which recited that the sale was made for necessary purposes. This instrument was witnessed by the person who was *at that time* the next (reversionary) heir to the property, and who afterwards died. In a suit to set aside the sale brought by the heir next after him, and who was not born at the time that the instrument was executed, it was held that the assent of the first heir, signified by his witnessing the conveyance, was not in law conclusive on the question of necessity, though it was strong evidence of good faith (*Madhab Chandra Hajrah* v. *Gabind Chandra Banerji and others*, 9 W. R. Civ. Rul. 350). A Hindú father adopted a son, and afterwards, while this first adopted son was alive, adopted a second son, such second adoption being, however, invalid by Hindú law. The first adopted son, after he came of age, acquiesced in a division of the property made by the father between his two adopted sons. It was held that, although such first adopted son was bound by this acquiescence with regard to the property of which the father had the power of disposing by an act *inter vivos* without his consent, he was not bound thereby as to the disposition of the *ancestral* property (*Rangama* v. *Atchama and others*, 4 Moo. Ind. Ap. 1). The service of notice of foreclosure on the occupant of mortgaged property (a person who claimed as purchaser from the mortgagor, but who afterwards failed to establish this title) was held not to estop the mortgagee from disputing such occupant's title to redeem (*Prannath Rai Chaudhri* v. *Rokea Bégam and others*, 7 Moo. Ind. Ap. 359). A Hindú died leaving a minor son A, three daughters, B, C, and D, and a widow E. After his death and that of A during minority, E adopted a son under an alleged power conferred by will. B subsequently bore a son, and having brought a suit to establish this son's rights as heir to the property and to set aside the adoption, it was contended that she had known of and had assented to the adoption. It was held that, even if it were so, her conduct in this respect could not prejudice the rights of her son who was at the time unborn (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. 157). A Muhammadan took out probate of a will, and it was held that this did not estop his heirs from disputing the will (*Muhammed Madan and others* v. *Khodiz-unissa* alias *Khuki Bibi*, 2 W. R. Civ. Rul. 181). A judgment-debtor made a *benami* purchase of the decree obtained against himself and other judgment-debtors and took out execution which was submitted to by the other judgment-debtors. It was held that their having so submitted did not prevent them from objecting, when a further application for execution was made, that a co-judgment-debtor being the real pur-

chaser was not entitled to execute the decree[1] (*Obhai Charan Rai Chaudhri* v. *Nabin Chandra Rai Chaudhri*, 23 W. R. 95). In a suit for possession of land against a person, who was really a trespasser, it was held by a Full Bench that, by setting up in his written statement a false case of being a tenant, he did not preclude himself from also raising the defence of limitation (*Denomani Debi* v. *Durga Persad Mazimdar*, 12 B. L. R. 274; S. C. 21 W. R. 70). When a person claimed as his own property attached in execution of a decree against another person and, his claim being rejected without inquiry, purchased the property at the sale, it was held that his so purchasing did not estop him from asserting as against a mortgagee prior to the sale that the property was his independently of the sale (*Pandit Hanuman Dat* v. *Mufti Asadula*, *&c.* 7 N.-W.-P. Rep. 145).]

Estoppel of tenant.

116. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

["No rule," says Mr. Smith in his note to the Duchess of Kingston's case, "can be more clearly settled than that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered. The case oftenest cited for this is, perhaps, *Doe d. Knight* v. *Lady Smythe* (4 M. and S. 347). 'It has,' said Dampier, J. in that case, 'been ruled often that neither the tenant nor any 'one claiming by him can dispute the landlord's title. This, I believe, 'has been the rule for the last twenty-five years, and, I remember, was 'so laid down by Buller, J. upon the western circuit.' Accordingly, in *Doe d. Bullen* v. *Mills* (2 B. and Ad. 17), it was held that if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been,

[1] In accordance with the Full Bench decision in *Sarup Chandra Hazra* v. *Troylakhnath Rai*, *&c.* 9 W. R. 230.

from disputing the landlord's title." This rule has been acknowledged and acted upon in India (*Mussumat Purnia* v. *Sheikh Torab Ali*, 8 R. J. & P. J. 14: *Jainarain Bose* v. *Kadimbini Dasi*, 7 B. L. R. 723, note). In the case of *B. Donzelle* v. *Kedarnath Chakravartti* (7 B. L. R. 721) A had executed a *kabuliyat* to B, the *zemindár*. B subsequently granted a *patni* lease to C, who sued A for rent upon the *kabuliyat* executed in favour of his superior landlord. A admitted the execution of the *kabuliyat*, but pleaded that B was not the real owner, being merely a *benamidár* for her husband. It was contended that A was estopped from denying B's title; but it was held that the technical doctrine of estoppel had no application, and that it was open to A to prove his plea. This case was decided before the Indian Evidence Act came into operation—see also *Bipin Behari Chaudhri* v. *Ram Chandra Rai*, *&c.* 5 B. L. R. 235. It has been decided in England that where premises are let by the agent of an unnamed landlord, as such, the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed (*Fleming* v. *Gooding*, 4 M. & Scott 455; S. C. 10 Being. 549).

Licensee.

An example of the principle applied to a licensee is supplied by the case of *Doe d. Johnson* v. *Baytup* (3 Adolphus and Ellis's Reports 188), in which the defendant asked leave of the party possessed to get vegetables in the garden, and having thus obtained an entrance, took possession of the house, claiming a title. It was held that he was estopped, and that if he wanted to establish his title, he must first give up possession to the party by whom he was let in.

Tenant may show expiry, &c. of Landlord's title.

Although a tenant may not, during the continuance of the tenancy, deny that his landlord had a title at the beginning of such tenancy, he may show that such title has expired or has been defeated by a title paramount. Here he does not dispute the title but confesses and avoids it by matter *ex post facto*.

The tenant may not deny that his landlord had a title *at the beginning of the tenancy*. English text-writers in discussing the principle generally speak of *the letting into possession* as that which creates the estoppel, and the application of the principle has in more than one case [1] depended upon the answer to the question, what constitutes a letting into possession. "In one case," says Mr. Taylor, "where a party was in possession of premises without leave obtained from any one, and a

[1] See the remarks of Tindal, C. J. in *Claridge* v. *Mackenzie*, 4 Manning and Granger's Reports, 152.

person came to him and said, 'you have no right to the premises,' upon which he acquiesced and took a lease from this person, the Court held that the relation of landlord and tenant was sufficiently created to debar the one from disputing the title of the other. But, in a subsequent case, where a tenant being already in possession of premises under a demise from a termor, had, at the expiration of the termor's right, when his own title also expired, entered into a parol agreement with another party, to hold the premises under him; but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises; it was held that the agreement was not equivalent to a first letting into possession. This question may, in certain cases, become highly important, because neither a parol agreement by a tenant to hold premises of a party, by whom he was *not let into possession*, nor an attornment, nor an actual payment of rent to such party, even under a distress, will in themselves operate as estoppels, but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances or in the case of payment of rent, that some other party was entitled to receive it—" (§ 90.)

Effect of payment and receipt of rent.

It will be convenient to consider here the effect of the receipt and payment of rent as admitting the relation of landlord and tenant on the part of the former and of the latter respectively. In the case of *Doe d. Harvey* v. *Francis* (2 Maclean and Robinson's Scotch Appeals, 57) Patteson, J. said: "That where a tenancy was attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received." It has been held, however, that the tenant will be concluded by payment of rent, if he cannot show that it was paid under a mistake or that some other person was entitled to it, or cannot show some special reason to the contrary. Submitting to a distress and paying rent under it is a strong admission of title in the distrainer, but it is not conclusive and may be rebutted by showing that he never had any title. A distress by the landlord admits the tenancy to be a subsisting relation up to the time of distraining. Speaking generally, these principles have been followed in India—see the following cases, *viz.*:—*Obhai Gobind Chaudhri* v. *Bigai Gobind Chaudhri*, 9 W. R Civ. Rul. 162, (admission of payment of rent held equivalent to admission of tenancy in the absence of evidence to rebut): *Beni Madhab Ghose* v. *Tukur Das Mandal*, 9 W. R. Full Bench, 71 (payment of rent not conclusive, but

only *primâ facie* evidence, which the tenant is not estopped from rebutting, if he can): *Mohesh Chandra Bose, &c.* v. *Ugra Kant Bannerji, &c.* 24 W. R. 127 (receipt of rent by reversionary heir held to ratify tenure granted by widow while she held the estate). It has been held that the resumption of lakheraj land does not dissolve the contract between the landlord (former *lakherajdár*) and his tenant, but that the tenant has the option either to determine the tenancy or consent to have the revenue payable to Government by his landlord, or a portion of it, added to his former rent (*Mussamat Farzhara Banú and others* v. *Mussamat Azizanissa Bibi and others*, B. L. R. Sup. Vol. F. B. 175).

When a person purchased an under-tenure alleged to be transferable, and contended that the *zemindar* by receiving rent from him had conclusively admitted him as purchaser to be his under-tenant, it was held that mere acceptance of rent could not have such an effect, though it might be otherwise if such acceptance were with notice or full knowledge of the fact. In the absence of such notice, it was observed that the payments might have been voluntary payments, or payments such as that of a mortgagee to save his own interest, which a zemindar is not bound to recognize (*Mirtan Jai Sirkar* v. *Gopal Chandra Sirkar*, 2 B. L. R. A. C. 13: *Gaur Lal Sirkar* v. *Rameswar Bhumik*, 6 B. L. R. App. 92). It has been held that Government is not estopped from claiming land as an escheat in default of heirs by having received revenue from a person who entered after the death of the proprietor, who left no heirs (*The Government* v. *Giridhari Lal Rai*, 4 W. R. Civ. Rul. 13). Where a landlord with full knowledge of the facts accepted rent from his tenant's mortgagee, it was held that he was thereby estopped from disputing the mortgage (*Ganga Bissen and others* v. *Ram Gut Rai*, 2 N-W-P Rep. 49).

If a landlord sue A for rent, and afterwards discover that A only holds *benami*, while B is the real tenant, he is not thereby estopped from suing B subsequently on his discovering the real state of things (*Prosonno Kúmar Paul Chaudhri and others* v. *Kailas Chandra Paul Chaudhri*, 7 W. R. Civ. Rul. 428; S. C. 2 Jur. N. S. 327: *Bipinbehari Chaudhri* v. *Ram Chandra Rai and others*, 5 B. L. R. 235: *Jadúnath Paul* v. *Prosunnonath Dutt and others*, 9 W. R. Civ. Rul. 71: *Hiralal Bakshi* v. *Rajkissore Mazimdar and others*, W. R. Spec. No. 58). In this last case, which was heard by a Full Bench, Peacock, C. J. said:—"It was necessary to try whether Híralal was the real proprietor, and whether Rúpchand was merely his agent or not. The Judge had power to determine that question, and has found that the *izarah* was *benami*, and that Hiralal was the actual farmer and person beneficially interested in it. That being so, we are of

opinion that Hiralal, as the proprietor, was liable for the arrears of rent. It is a general rule of English law that when an agent enters into a contract in his own name as principal without disclosing the fact that he is acting merely as agent, the principal when discovered is liable to be sued upon the contract. But the principal is not liable upon the contract of his agent, if the other party to the contract with full knowledge of the facts, and having the power and means of deciding to whom he will give credit, elects to give credit to the agent in his individual character.[1] This rule is founded on principles of justice, and is applicable as well in this country as in England." It is also a rule of English law that when the agent contracts in his own name as principal, parol evidence, though admissible to charge the real principal, is not admissible to discharge or exonerate the agent.[2] Where the contract on the face of it purports to have been made between A and B, and it is sought to show by oral evidence that not A and B, but A and C, were the contracting parties, it may be said that this is really introducing oral evidence to contradict the writing. Norman, J. took this view in *Bipinbehari Chaudhri* v. *Ram Chandra Rai* (5 B. L. R. 243), and was of opinion that it could not be done. Whether the provisions of the Evidence Act alter the question is a point about which there may be a difference of opinion. Section 92 makes no express exception in favour of the admissibility of this evidence. In *Trueman* v. *Loder* (11 Adolphus and Ellis's Rep. 595) the Lord Chief Justice said:—"Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it: whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or that of an agent, are inquiries not different in their nature from the question—who is the person who has just ordered goods in a shop? If he is sued for the price and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own."

There is one more point connected with the present subject which it will be desirable to notice, more especially as the rule in India does not agree with the rule in England. Under English law, a tenant by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender the previous tenancy. Some doubt has been of late years thrown upon this doctrine in England: but it may

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[1] See *Paterson* v. *Gandasequi*, *Addison* v. *Gandasequi*, *Thomson* v. *Davenport*, 2 Smith's Leading Cases, 347, 356, and 364; and sections 232, 233, and 234 of the Indian Contract Act, IX of 1872.

[2] See 2 Smith's Leading Cases, 7th edition, 393, *et seq.*

safely be said that it has no application to land in India out of the Presidency towns, it being notoriously customary for tenants who hold protected tenures to accept fresh leases upon every change of proprietorship, whether by inheritance, private sale, or auction-purchase. The new lease is generally regarded as confirmatory of the tenure, and the fact of the tenure being an old one is occasionally, though not always, mentioned therein—see *Ramchandra Dutt* v. *Jageshchandra Dutt*, 14 B. L. R. 229.]

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

["The acceptance of a bill of exchange," says Mr. Taylor, "is also deemed a conclusive admission, as against the acceptor, of the signature of the drawer, and of his capacity to draw; and, if the bill be payable to the order of the drawer, of his capacity to indorse; and, if it be drawn by procuration, of the authority of the agent to draw in the name of the principal; and it matters not, in this respect, whether the bill be drawn before or after the acceptance. The law, however, in general recognizes no such admission on the part of the acceptor, either of the signature of the payee, though he be the same party as the drawer, or of that of any other indorser: and this too, although, at the time of the acceptance, the indorsements were on the bill. Neither does the acceptance admit that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same. So, if on a bill payable to the order of the drawer the name of a real person as drawer and indorser be forged, it seems that the mere acceptance of such bill, in ignorance of the forgery, will not

preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit; but if the acceptor with knowledge of the forgery puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing"—(§ 778). See also Story on Bills of Exchange, §§ 113, 114, 115, 252, 262, 412.

As to *Bailments*, see Chapter IX, sections 148—181 of the Indian Contract Act, IX of 1872. Section 167 enacts that if a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor and to decide the title to the goods.

The Act is silent on the subject of *Agents*, who are not, ordinarily, permitted to set up the adverse title of a third person to defeat the rights of their principals, or to dispute the title of their principals—Story on Agency, § 217.]

CHAPTER IX.

OF WITNESSES.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

[The tendency of modern legislative progress, discriminating between the *competency* and the *credibility* of witnesses, has operated to remove former grounds of exclusion, and to admit to the witness-box all persons from whom even a grain of truth can be gleaned, leaving it to the Court to attach to their evidence that amount of credence which it appears to deserve from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with

such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. To Mr. Bentham and Lord Brougham are due the results which have been achieved in this respect in England. The sound theories of the former, and the practical wisdom and legal ability of the latter, have produced the present satisfactory state of the law thus described by Mr. Warren :— "As the admission of evidence generally is the rule and the exclusion of it the exception, so it is with witnesses. Their competency is the rule: their incompetency the exception, and that incompetency lies now within a very narrow compass. With the admission of the very parties themselves in civil cases, subject to few and specified exceptions, disappeared the last vestige of exclusion in civil cases. . . . . Such questions as can now be raised as to the competency of a witness must be determined by the Judge. Once declared by him competent, the credibility of the testimony given by the witness is determined by the jury alone; or by the Court or a Judge, where respectively empowered or required to determine questions of fact either with or without juries"—(Law Studies, Vol. II., p. 1110).

The above section of the Indian Evidence Act extends admissibility to its utmost reasonable limits, for it declares *all persons* to be *competent* to testify, unless they are in the opinion of the Court unable to understand the questions put to them or to give rational answers to those questions. When, therefore, a child is produced as a witness, the only question is whether it has sufficient intelligence to understand the questions put to it and give rational answers thereto. When a Sessions Judge thought a child sufficiently intelligent to understand and answer, but too young to understand the nature of an oath and therefore advisably examined it on simple affirmation, it was held with reference to section 13 of "The Oaths Act" that the evidence was none the less admissible (*The Queen* v. *Mussamat Itwarya*, 14 B. L. R. 54; S. C. 22 W. R. Crim. Rul. 14: *The Queen* v. *Sewa Bhogta*, 14 B. L. R. 294; Full Bench decision overruling *The Queen* v. *Ananto Chakravartti*, 14 B. L. R. 295 note; S. C. 22 W. R. Crim. Rul. 1).

A question was raised under this section, as to whether an accused person in a criminal case can be examined as a witness on his own behalf. This question was decided in the negative. In order to testify, it may be observed, that an oath or solemn affirmation must be administered to the person called as a witness. The Code of Criminal Procedure, while expressly providing for the examination of the accused person, enacts that "no oath or affirmation shall be administered to the accused person" (section 345). This clearly shows that it was not the intention of the Legislature that accused persons should

be competent witnesses on their own behalf, at least in cases governed by the Code of Criminal Procedure.

Where there are several persons jointly accused, the rule followed in England has been that any one of them may be called as a witness either for or against his co-defendants, excepting only in those cases where the indictment is so framed as to give him a direct interest in obtaining their discharge; and this rule has been expressly approved of in India (*The Queen* v. *Ashraff Sheikh and others*, 6 W. R. Crim. Rul. 91). There does not appear to be anything in the Evidence Act or in the new Code of Criminal Procedure which conflicts with such a rule.]

Dumb witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Married persons in Civil and Criminal Proceedings.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

[Section 118 declares all persons, speaking generally, to be *competent* witnesses; but a person may be a *competent* without being a *compellable* witness.

Witness may be competent without being compellable.

His testimony may be admissible if he be examined, or if he offer himself as a witness, but he may have some protection or privilege, so that, if he be unwilling, he cannot be compelled to give evidence. This protection or privilege may be general as regards the whole of a case; or it may concern only some particular subject of evidence, so that the same person may be at one time compellable and at another time not compellable, and this even in the same examination. Again, there are some rare instances in which the law goes still further and will not permit the witness to speak, even if he be willing. The eleven sections which follow will supply illustrations

of these remarks. The procedure to be followed in order to *compel* the attendance of witnesses to give evidence in civil and criminal cases forms a portion of the Codes of Civil and Criminal Procedure.

Formerly, *parties* to civil suits and the *husbands and wives of parties* were not competent as witnesses. It was thought that the interest they had in the subject-matter of the dispute must make their testimony unreliable, if not false. We have seen (*ante*, page 15) under what auspices the law on this point was altered in England and in India. Under the old Code of Civil Procedure if it was sought to call as a witness a party to the suit, who did not of his own accord appear in person, it was necessary to serve him with a notice to show cause why he should not attend and give evidence. This is no longer necessary under the new Code, and the position of parties to the suit is in no wise different from that of other witnesses.

Section 55 of the Indian Succession Act, X of 1865, enacts that no person, by reason of interest in, or of his being an executor of, a will, is disqualified as a witness to prove the execution of the will, or to prove the validity or invalidity thereof.

Suits under the Divorce Act.

Parties to suits instituted *in consequence of adultery* and also their husbands and wives were formerly not competent as witnesses in such suits. The law on this point was altered in England by the 32 & 33 Vict. Cap. 68, section 3, with this proviso, that no witness, whether a party to the suit or not, shall be liable[1] to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. Apart from the 32 & 33 Vict. Cap. 68, section 3, the law in England appears to stand thus—On a petition presented by a wife, praying that her marriage may be *dissolved* by reason of her husband's adultery coupled with cruelty or desertion, the husband and wife respectively are *competent* and *compellable* to give evidence of or relating to such *cruelty* or *desertion*, but not as to the adultery (22 & 23 Vict. Cap. 31, section 6); this provision however does not apply when the petition is for judicial separation on the ground of adultery; in all suits for nullity of marriage, for judicial separation on account of cruelty or desertion (not coupled with adultery), for jactitation of marriage or for restitution of

[1] If the witness without claiming the benefit of the proviso give the evidence, it will be admissible, and it is not competent to counsel for either party to exclude it (*Hebblethwaite* v. *Hebblethwaite*, L. R. 2 P. & M. 29). The statements, written or verbal, of a respondent not examined as a witness are not evidence against a co-respondent (*Hay* v. *Gordon*, 10 B. L. R. 301).

conjugal rights—unless in the last case the respondent by answer asks for a judicial separation on the ground of adultery—the husbands and wives are competent and compellable to be examined as witnesses on either side (See Tay. §§ 1220-1221): but (20 & 21 Vict. Cap. 85, section 43 the Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition,[1] but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery. Section 51 of "The Indian Divorce Act," IV of 1869, enacts that "the witnesses in all proceedings before the Court where their attendance can be had, shall be examined orally, and *any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witness; provided that* the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed." Section 52 enacts that "on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be *competent* and *compellable* to give evidence of or relating to such *cruelty* or *desertion*." The result is that, though, upon a petition by a wife for dissolution of the marriage on account of adultery coupled with cruelty or desertion, the parties are *competent* and *compellable* to give evidence as to the *cruelty* and *desertion*, they cannot in this case be examined or cross-examined as to facts relating to acts of *adultery* and cannot in other cases be examined at all, unless they *offer themselves* as witnesses (see *Kelly* v. *Kelly and Saunders*, 3 B. L. R. App. 6), or verify their cases by affidavit. It will thus appear that the rule as to the parties to matrimonial cases being competent and compellable to give evidence is more restricted in India than in England. Whether cases under "The Indian Divorce Act" are "*civil proceedings*"[2] within the meaning of the above section of the Evidence Act, and it is therefore

[1] See this power exercised in *Tatham* v. *Tatham and Nutt*, 33 L. J. P. M. & A. 140.

[2] Section 45 of the Divorce Act enacts that "subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

to be taken to alter the rule in such cases, or the principle '*generalia specialibus non derogant*' applies—is a point which has not yet risen or been decided.

Husbands and Wives in Criminal Proceedings.

So much of the section as declares husbands and wives competent witnesses against each other in criminal proceedings differs from the rule of English law, which does not allow the admission of this evidence; but is in accordance with the Full Bench decision of the Calcutta High Court in the case of *The Queen* v. *Kheirúla and others* (6 W. R. Crim. Rul. 21; S. C. B. L. R. Sup. Vol. F. B. Appen. 11). The following passage from the judgment of *Peacock, C. J.* in this case will sufficiently explain the reasons which have operated to introduce in India a rule different from that which has been followed in England:—"Two questions have been referred in this case; 1*st*,—Whether, upon a trial in the Mufassil of a person charged with an offence, his wife is competent to give evidence for or against him? 2*nd*,—Whether, upon a trial in the Mufassil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others? I am of opinion that both of those questions must be answered in the affirmative. It is a general rule of English law, subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other. But the English law is not the law of the Mufassil . . . . . It is clear that the English Criminal Law was not the Criminal Law of the Mufassil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there."

"Section 3, Act XV of 1852, did not render a husband or wife incompetent for or against the other in criminal cases. It merely declared that nothing in the Act should render them competent. Act II of 1855 did not affect the matter now under consideration. It is clear that section 14 did not render a wife competent to give evidence against her husband in a criminal case. It declared that the persons therein mentioned only should be incompetent to give evidence. It rendered them incompetent in all cases, but it did not render any person competent or incompetent with reference to particular persons or particular cases. Section 20 applied to civil proceedings only; and section 58 declared that the Act was not to be so construed as to render inadmissible in any Court any evidence which, but for the passing of the Act, would have been admissible in such Court. It should be observed that, at the time when Acts XV of 1852 and II of 1855 were passed, the Muhammedan Criminal Law, as modified by the Regulations, was the general

Criminal Law of the country. . . . . In *Mussamat Mughni* v. *Ohariya* (1 Nizamat Adálat Reports 144) the evidence of the prisoner's wife was admitted, in corroboration of other evidence, against him to support a sentence of death or other punishment by Seasut. In 2 Nizamat Adálat Reports for 1852, page 156, Mr. Mills, in a case of culpable homicide, says, 'though the testimony of a wife against her 'husband may be received in our Courts, yet the practice of summoning 'a wife to give evidence against her husband has been always held to be 'objectionable, and it is one which should on no account be encouraged.' In 2 Macnaghten's Nizamat Adálat Reports, 150, the Court observed, the wife of the prisoner was called to give evidence against him, though her evidence was wholly unnecessary; that the practice of summoning such a near relation to the prisoner as a witness for the prosecution, *excepting in case of urgent necessity*, was *considered highly objectionable*, and the Court directed that such a practice should be discouraged. In 3 Macnaghten's Reports, it was held, contrary to the *fatwa* of all the law officers, that the evidence of a son was admissible against his father in a criminal case."

"But it is not necessary to allude further to these cases, except to show that *it was the practice of the Nizamat Adálat to admit the evidence of a wife against her husband*, or a son against his father, in criminal cases, in which the sentence was by Seasut. I do not, however, place much reliance on those cases, as they were decided under a very different system of law from that which now exists. Still they show that at that time the evidence of a wife was legally admissible. *The Muhammedan Criminal Law, including the Muhammedan Law of Evidence, is no longer the law of the country. It has been superseded by the Penal Code and the Code of Criminal Procedure, so far as they go, but they, do not touch upon the rules of evidence.* After the passing of the Penal Code and the Code of Criminal Procedure, Regulation IX of 1793, by which the Muhammedan law, as modified by the Regulations, was established as the general Criminal Law of the country, and many other Regulations bearing upon the same subject were repealed by Act XVII of 1862. A Code of Evidence has not yet[1] been passed, and we have no express rule laid down by the Legislature in any existing law upon the subject now under consideration. *By the abolition of the Muhammedan Law, the Law of England was not established in its place.* I know, therefore, of no law which renders a husband or wife incompetent to give evidence against the other, or which excludes the evidence of others who are bound by the closest ties of relationship."

[1] The above judgment was delivered in 1866.

"It has, however, been held by a Division Court that the evidence of a wife is not admissible against her husband in a criminal case, even in corroboration of other evidence (*Regina* v. *Gaurchand Polié and Dwarki Polie*, 1 W. R. Rul. in Crim. Cases, 17). In that case the Judges say:—'We think that the evidence of the wife 'against her husband should not have been received. It is true that 'there are cases published in the earlier Reports of the Nizamat Adálat 'in which the evidence of the wife has been received against the hus-'band, in *corroboration* of other evidence; but this practice has been 'reprobated by later decisions of the same Courts, and is certainly 'opposed to the general principle of all Criminal Law. The Judge has 'quoted section 20, Act II of 1855, but this section refers to civil pro-'ceedings. The Judge would hardly condemn a wife who committed 'perjury for her husband, and, on the other hand, he would most likely 'discredit her if she appeared too willing a witness against her husband.' With reference to that part of the judgment in which it is said that the practice has been reprobated in later decisions, I would remark that it was merely the practice of compelling a wife to give evidence against her husband, when her evidence was not necessary, that was reprobated, and that it is to be inferred that the evidence is admissible, although the attendance of a wife against her husband ought not to be compelled when not necessary. In this I entirely concur. . . . . ."

"If these arguments are not sufficient to show that the rule of exclusion in England is merely a rule of positive law, and not one depending upon the fundamental principles of natural justice, I would adopt the arguments of the eminent and highly distinguished jurist, Mr. Livingstone, in his introductory Report to the Code of Evidence prepared by him for the State of Louisiana. He says:—'The exclusion of inter-'ested testimony having been examined and found to be injurious to 'the investigation of truth, and its admission 'to be attended with no inconvenience, 'which may not be reduced to one of a quan-'tity that has no assignable value, it of course finds no place in the 'proposed Code; and with it disappears one of the most fruitful sources 'of uncertainty, expense, delay, and inconvenience in the law. If the 'search after truth requires that interested witnesses, and even the 'parties themselves, should be interrogated to discover it, are there any 'relations in which the offered witness may stand to the parties that 'exclude his testimony? By the English law, and, of course, in the 'several cases which have been noticed by ours, there are several, 'husband and wife, &c. I. The Code now offered does not contain 'the exclusion of husband or wife as witnesses for or against each other;

Mr. Livingstone's Arguments.

'because the reporter does not find any one sufficient among the reasons 'by which it is supported in the English decisions or commentaries. 'The first of these alleged reasons is, that their interests are identical '(2 Starkie, 706, 1 Bl. 443). But in a system which discards interest 'as an objection to competency, this reason fails of course. The second 'is said, by the same authority, to be '*on grounds of public policy*' to '*prevent distrust and dissension between them, and to guard against per-*'*jury*. In the case before us the public evils are designated: *first*, the 'danger of domestic dissension; *secondly*, the danger of perjury—the' 'first, if the evidence should be against the party connected with the 'witness; the second, if it should go to exonerate him. The argu-'ment supposes that, if the husband or wife be called as a witness in a 'suit to which the other is a party, one of two things must happen: 'either unfavourable truths will be told, which it is said will disturb the 'family peace, or perjury will be committed to preserve it. Now, these 'are two opposite and contradictory reasons. If the danger be, that 'family discussions will grow out of the testimony, then that of perjury 'is avoided; if the danger be perjury, then that of family discord need 'not be apprehended. But legislation must be founded on the general 'application of its reasons, not on the tendency of its measures to good 'or evil in particular instances. If the connection by marriage be so 'close as to make the parties incur the danger and disgrace of giving 'false testimony for the other, then let the case be examined solely 'with a view to the evil of placing the witness in a situation where 'strong motives are offered to him to commit a crime. If the pre-'dominant risk be that of destroying domestic harmony, let that be 'assigned as the reason. But to allege both, when they are contradic-'tory, is a strong presumption that neither can safely be relied upon. 'Both, however, will be examined, and both contrasted with the evils 'which attended the exclusion.'

'First, let us suppose that domestic dissension is the danger; that 'is to say, that one spouse will quarrel with the other for telling the 'truth in a Court of Justice, when it makes against the interest of the 'other. But in most cases the interest is common between them, there-'fore there is little probability that any ill-will can be created in the 'mind of the one against the other for not committing perjury, in order 'to protect a common interest. The supposition that a domestic broil 'may ensue from a cause like this, is to suppose the party raising it 'corrupt in expecting falsehood from his or her spouse, and malevolent 'in resenting his disappointment; and the law cannot reasonably be 'required to make any great sacrifice for preserving the harmony of so 'ill-assorted a union as that which such a case supposes. The dissen-

'sion arises from the performance of a duty,—bearing open testimony 'of the truth; and avoiding a crime,—the commission of perjury; and 'because a brutal, corrupt, or passionate husband may quarrel with his 'wife for avoiding the crime, shall the law declare that the wife shall 'not perform the duty? It will watch over domestic peace by punish-'ing those that disturb it, and, for proper causes, by dissolving the 'bond of an ill-assorted connection; but it ought never to say that 'the one party shall be exempted from the performance of an import-'ant public duty, because the other is tyrannical and unjust. The 'argument supposes, too, that there is greater danger to domestic 'happiness from this than from any other source; but is there any 'foundation for the belief? Not one case in a thousand, it is believed, 'will occur in practice where any improper excitement will be created 'by an adherence to the truth, although it should militate against the 'wife or the husband of the party who states it. Why should it more 'in this case than in that of any other witness? Mutual affection, the 'knowledge that it was the performance of a duty required by law, 'and that it could only be avoided by a crime, are so many and such 'cogent reasons to prevent ill-will on the occasion, that it is astonish-'ing how this reason could find favour with the great lawyers who 'have assigned it as an argument in favour of their rule; more 'especially when they themselves most explicitly discard this reason by 'declaring that the wife shall not be allowed to appear as a witness 'against the husband even if he consents, or after a divorce; nor 'against the interest of his heirs after his death (2 Starkie, 706; 6 East, '192). How connubial happiness can be disturbed by a compliance on 'the part of the wife with her husband's request while united, or by 'any act after the connection has been dissolved by death or divorce, 'these learned Doctors of the law alone can explain.'

'Examine the opposite reason, the danger of perjury; that is to say, 'the matrimonial union is so strict, that the one party to it will incur 'all the dangers of punishment and infamy rather than tell the truth 'when it is injurious to the other; and the law, it is said, holds out 'this irresistible temptation to the witness when it permits him to be 'examined; yet, by the preceding argument, the temptation is easily 'resisted, the truth will be told, and this strong connection is so weak, 'that it is broken merely on that account.'

'But the arguments must be destroyed, not by opposing the one to 'the other, but both of them to the truth. There is no doubt that in 'this, as in many other cases, minds may be found that will waver 'between the declaration of truth that may hurt their interests or their 'feelings, and the assertion of a falsehood that, in their opinion, may

'secure both from injury; but can the law be said to hold out a temp-
'tation to perjury when it orders a party, under those circumstances, to
'tell the truth? If there were no temptations to conceal the truth, or
'assert a falsehood, there would be no need of oaths. *Oaths, and the*
'penalties for breaking them, were made for the purpose of counteract-
'ing that disposition. If they were to be dispensed with in cases where
'that disposition exists, there would be no need for them in any others.
'In every such case, then, it may with equal reason be said that the
'law holds out a temptation to perjury, because it exacts the oath to
'tell the truth, when there is an inclination to conceal it; and the
'argument would extend with equal reason to the abolition of oaths,
'and the penalties for the breach of them. This exclusion is at vari-
'ance, too, with other provisions of the law as they already exist. The
'party himself may be interrogated in Chancery in England, and in all
'cases at law here. The wife may be interrogated to support an
'accusation made by herself against her husband, for a personal injury,
'in some cases affecting his life; yet she is not permitted to prove a
'fact that would save him from an ignominious death on a charge
'brought against him by another. Now, in all these cases, the danger of
'perjury is equally great, or greater, unless we suppose the attachment
'of a wife to her husband's interest superior to his own, or her desire
'to make good her own charge less intense than that which she would
'feel to support the accusation brought by another. The danger of
'perjury is no greater in this than in other cases in which it is incurred
'without scruple—in the dearest connections of nature, father and son,
'mother and child, brother and sister, friendships of the most intimate
'kinds, habits of intimacy during a long life—the parties to all these
'are every day arrayed for and against each other as witnesses, and the
'law interposes no other safeguard to their consciences than its penal-
'ties and the danger of infamy by detection. No rule of exclusion
'protects the witness against the influence of his affections or his
'interests. He is heard, and the degree of connection is weighed
'against his character and the probability of his story; the counsel
'cross-examine, the public inspect, the jury interrogate and calculate
'and determine, and no inconvenience is felt in those cases. Why
'should there be in this?'

'Having stated the general principle, that every party to a suit has
'a right to all the information in relation to his cause, of which he
'ought not to be deprived, but for reasons of great public or private
'inconvenience; and examined, by discussing the reasons for exclu-
'sion in this case, whether it offers any such inconvenience; let us
'now examine the particular evils attached to the rule as it now stands.

'In criminal cases the evil is most apparent. Suppose the husband, 'accused by positive, but perjured, testimony of a crime affecting 'his life, and the wife the only witness of a fact that would prove 'his innocence—no matter what circumstances she could adduce to 'corroborate her testimony; no matter what intrinsic evidence it 'contained; no matter what perfect conviction it would produce of its 'truth, it is sternly excluded; and the innocent husband is executed 'because *public policy requires that the peace of families should not 'be disturbed, and that no temptations should be held out to perjury.* 'In this case—by no means an improbable one—there is positive evil, 'cruel injustice, heart-rending distress. In the case which the law 'attempts to guard against, inconvenience, only if it occurrs—but an 'inconvenience highly improbable to happen, inasmuch as it is supposed 'to affect domestic union; and as it is believed to be a temptation to 'perjury, not one strong enough to produce the effect, or, should it be 'yielded to, it would be capable of detection by the usual means. 'But even without supposing the extreme case of life or death, *the 'suppression of testimony is in all cases an evil; and the law deprives 'a party of a certain right to avoid a problematical inconvenience.* 'On the other hand, suppose the testimony of the wife necessary to 'procure the conviction of the husband; she is the only witness 'to a murder he has committed. *This I consider the strongest ground 'for the exclusion; it enlists the feelings, and they are most frequently 'found on the right side.* Shall a wife be forced to give testimony 'that will condemn her husband, the father of her children, to infamy 'and death, or take refuge in the crime of perjury to avoid it? I con- 'fess that, if the alternative could be avoided, a humane lawgiver would 'not enjoin it; but if sympathy for individual distress should not be 'entirely rejected, it ought never to be entertained when its indulgence 'would lead to more extensive injuries to the community. A wise and 'provident legislator must have the consequences of every legal pro- 'vision as present to his mind as its immediate operation is to his 'senses; and in applying this rule to the subject under consideration, 'he should not, in tenderness to the feelings of conjugal affection, 'permit the husband or wife to escape punishment for a crime, or 'defraud another of his right, by declaring that the only witness of 'the offence, or the wrong, shall not be heard. Some crimes cannot be 'perpetrated without the aid of an accomplice. The accomplice may 'betray the principal. The fear of this treachery, in many instances, 'may prevent the crime, or a person may not be found willing to 'engage in the enterprise. But, by the rule of exclusion, the law 'furnishes an assistant who can never betray, and one who is always

'at hand; and thus gives a facility to the commission of offences, 'which no other circumstance could possibly offer. Besides, public 'justice requires, and common sense would seem to point out, that those 'persons who are the most likely to be acquainted with the fact should 'be first called on to prove it; but who so probable to know the guilt or 'innocence of the party accused as the companion of all his hours, 'the depository of his most secret thoughts; and what better calculated 'to prevent an intended crime, than the knowledge that those from 'whom it is so difficult to conceal it may be made the unwilling wit- 'nesses of its disclosure? Precisely in the proportion that a man 'would be encouraged to commit a crime by the knowledge that the per- 'son to whom he finds it necessary to confide it cannot become a witness 'against him, will be his fear of committing it when he knows that 'there is no person in whom he may confide, that may not be forced 'or be willing to betray him.'

'So sensible of this have been the judicial lawgivers of England that 'they have imposed no bar to the receiving the testimony of father and 'son, mother and daughter, brother and sister, and all the other relations 'of consanguinity or affinity. They have had no regard to the confi- 'dences of friendship, and have thought that the affections of nature, as 'well as those of habit and sympathetic feeling, should afford no obstacle 'to the attainment of the ends of public justice. They have gone 'further, and made an exception to the rule, which they laid down as 'one inviolable even by consent (2 *Starkie*, 707; *Rep. Tem. Hard*, 264) 'in the case of husband and wife; and, as we have seen, have allowed 'the wife to be produced as a witness against the husband on a prose- 'cution for an injury done to herself. Now, mark the reason. It is 'a convenient and a ready one,—from the *necessity of the case*: which 'must mean, if it mean anything, that there is a necessity that crimes 'should be punished, and that, unless the testimony of the wife were 'admitted, they would not in those instances be punished. Now, admit 'this reasoning, and see whether it does not go to the utter destruction 'of the rule to which it is offered as an exception. There is no greater 'necessity for punishing a crime committed by the husband against his wife 'than there is for punishing the same crime committed by him against 'another; and if the wife is the only witness that can convict in the 'last case, her testimony is as necessary as it is in the first; and being 'necessary in both, it should not be admitted in one and excluded in the 'other. But in truth, the inquiry is never made; and in this and in all 'the other cases founded on the convenient argument of necessity, 'although there may have been twenty other witnesses present, the 'pretended necessary witness is admitted; and although there may be

'none but him conversant of the fact, he is rejected, where it has not yet 'been deemed convenient to admit the argument of necessity.'

'The advantages of receiving testimony from this source so greatly 'overbalance its evils, and the inconveniences and the injustice of 'rejecting it are so manifest, that I have not hesitated to give this 'exclusion no place in the Code." (Page 271.)

"In France, according to Article 322 of the *Code d' Instruction Criminelle*, a husband and wife and other specified relations, if objected to by the accused or by the Procureur-Général, cannot be a witness for or against one another, but the President may summon and examine any person, whether such person is comprised in Article 322 or not (see Article 269). The witness in that case is not examined on oath. These are matters of detail to be provided for, if at all, by an express law, and not by rules to be laid down by Judges."

"*But even if the rule of English law is founded upon sound and just principles, with reference to the state of society in England, it appears to me to be wholly inapplicable to the natives of this country, and to their social institutions and relations. A law which may be politic and just in a Christian country, in which a man is prohibited from having more than one wife and a woman from having more than one husband, may be wholly inapplicable to a country in which polygamy is allowed.* Can the legal fiction, that a man and his wife are one person, apply to a Koolin Brahmin and his fifty wives, or to a woman in Malabar and her several husbands?—or should the evidence of one of fifty wives against her husband be excluded lest it should cause dissension in the family? A law, which should allow a wife to give evidence against her husband in a case of personal injury committed upon her, and would not allow her evidence to be either corroborated or contradicted by other wives who were present at the time, would appear to me not to be founded upon the soundest principles either of policy or justice. It would be obligatory upon the Judges to allow a wife to give evidence against her husband upon a charge of an assault committed by him upon her, and to exclude her from testifying upon a charge against him of murdering their infant child when no one was present but themselves. Or would it be just to allow from necessity a wife to give evidence against her husband upon a charge of personal violence committed by him upon her, and to refuse the evidence of another wife on his behalf? If we had to decide this case upon our own notions of policy, I should admit the evidence of the wife, and leave the Court to judge of her credibility as in all other cases; but, even if my own opinion were against the policy of admitting such evidence, I should not feel justified in rejecting the evi-

dence of a wife, who was the only witness to the murder of her child by her husband, or in rejecting the evidence of a wife as a witness for her husband on a charge of a capital crime, preferred against him by one who admits that no one was present when the alleged crime was committed except the accuser, the husband, and his wife. *In the case of European British subjects who are governed by the law of England, we must administer that law. But in the Mufassil, where the law of England is not the law of the country, I consider that I should not be justified in excluding any witness who was not clearly incompetent by law. Primâ facie*, every one is competent and bound to give evidence, and every one who is charged with a crime is entitled to adduce on his behalf the evidence of any witness who can throw light upon the facts in dispute, and who is not expressly declared by the law to be incompetent. Would any Judge, unless bound by the clearest and most indisputable rule of law, condemn a prisoner to death for murder upon the evidence of the wife of another man, and, upon his own notion of public policy, reject the testimony of the prisoner's own wife in his favour? Would he do so, if it were proved that the three persons in question were the only persons present at the alleged murder, or that the husband of the witness was also present and that he had fled? We cannot import one portion of the English law and reject the remainder, without taking upon ourselves the duty of legislators. *I think that the evidence of the wife is admissible in both cases, because I do not find any law of this country which expressly provides against it.* The degree of weight to be attached to the evidence in such cases, must, as in every other case, be determined by those who have to decide upon it."

Sir J. Stephen's view.

It would be difficult to add anything to the arguments used by the learned Chief Justice, Sir Barnes Peacock. It must not be supposed that the rule of English law has been always approved in English without a doubt of its excellence. The following passage will show otherwise:— "Viewing the rule, therefore, with relation merely to the question of humanity, is it really humane? This is very doubtful. To an innocent man his wife's evidence may be matter of the greatest importance, and if the circumstances were such that, if she spoke falsely, she might be contradicted, or her falsehood might be exposed by cross-examination, her evidence might carry considerable weight. A man was tried for wounding another in a common lodging-house. The principal witness against him was the *mistress* of the wounded man. *His wife* was present, and, of course, could not be examined. He exclaimed with

much indignation, and not without considerable reason,—'*you have heard this woman, and will you not hear my wife!*' "[1]]

Judges and Magistrates.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistarte, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(*a.*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a Superior Court.

(*b.*) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(*c.*) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

[It will be important to notice that the privilege of the Judge or Magistrate extends only "*to his own conduct in Court as such Judge or Magistrate, or to anything which came to his knowledge in Court as such Judge or Magistrate:*" and it seems that, if he himself make no objection to answer the questions asked, no one else is entitled to object.[2] Arbitrators are within the rule in England. The definition of "Court" in the Evidence Act (*ante*, section 3) does not include arbitrators. There is no definition of the word "Judge" in the Act.[3]

Extent of the Privilege.

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[1] *Stephen's General View of the Criminal Law of England*, p. 286.

[2] So per Lord Alvanley in *Martin* v. *Thornton*, 4 Espinasse's Rep. 181.

[3] See the definition of "Judge" in section 19 of the Penal Code. It has been decided in England that a barrister cannot be called as a witness to prove what he said when conducting a case in Court (*Curry* v. *Walter*, 1 Esp. 456).

Can a Judge be a witness in a case tried by himself.

It will be convenient to notice in this place the question whether a Judge or Magistrate can give evidence in a case tried by himself. "A Judge before whom the cause is tried," says Mr. Taylor, "must conceal any fact within his own knowledge, unless he be first sworn: and consequently, if he be the sole Judge, it seems that he cannot depose as a witness, though, if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another"—(§ 1244.) In the case of the *Queen* v. *Mukta Singh* (4 B. L. R. Ap. Crim. 15), the above passage and the cases cited in support of the views expressed therein were referred to; and it was held that a Sessions Judge was a competent witness in a case tried by himself with the aid of assessors, provided that he had no personal or pecuniary interest in the subject of the charge. In the case of *Haro Chandra Pal and others, petitioners* (20 W. R. Crim. Rul. 76) a Deputy Magistrate had taken an active part in the capture of certain persons alleged to be members of an unlawful assembly, and then proceeded to try them. Phear, J. said:—"It has been held by this Court, and is accordant with the general principles which govern the conduct of an English Court of Criminal Justice, that, while a person is not necessarily disqualified from presiding as a Judge, or acting as a juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so, he is bound to state to the prisoner or other person concerned, or to make known to him, as far as he can, what are the facts which he himself observed, to which he himself can bear testimony. And moreover, the prisoner, who is being tried by a Judge in this situation, has a right, if he thinks it desirable, to cross-examine the Judge, who, under these circumstances and to this extent, must be viewed as a witness and his evidence should be recorded. . . . . The awkwardness of a Criminal Judge being the principal witness in the case which he has to try is no doubt most apparent; this, however, is reason for his declining to try the case." In the case of *The Empress* v. *Donnelly* (I. L. R. 2 Calc. 405), Markby, J. said:—"As to the point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this:—Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence? It has been

strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him, when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time (per Norman, J. in *Queen* v. *Mukta Singh*). No case in England is cited in which, even under these circumstances, a Judge has been called as a witness in a trial on which he was sitting, later than the trial of Lord Stafford. Two cases are cited as having occurred in this country—one the case of *Queen* v. *Tara Persad Bhattacharjya* in the N. A. Rep. for 1857, pt. 2, p. 83, and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully, and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that in the case before the late Nizámat Adálat, the trial took place with the assistance of a Muhammedan law officer, who might have given a Fatwa acquitting the prisoner, and that, if he had done so, the Judge who gave that evidence could not have convicted him, but could only have referred the matter to the Nizámat Adálat. Then he says at p. 19: 'Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammedan law officer, it would seem from the case cited, and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge must transmit an abstract of a trial to the High Court, and on perusal of such abstract, the Court may call for the record.' The learned Judge seems, therefore, to think that the presence of the assessors brings the case within the rule which he had derived from the English cases. Whether this is quite correct is, I think, open to some question, and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned Judge ultimately arrived. In the absence, therefore, of any authority for the position that a sole

Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination or contradict it by other testimony. I need say nothing of the indecency of such a proceeding; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated. It was contended that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge, being practically incapable of challenge or contradiction, ought not to be even taken. Moreover, a Court of Appeal is not a check in the same way that Judges sitting together are a check upon each other. I am therefore of opinion that *a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given.*" Prinsep, J. considered the authorities quoted by Mr. Justice Norman "conclusive that one, who is sitting as a sole Judge, is not competent also to be a witness."[1]

A Judge cannot import his own knowledge into a case, or base his judgment on what he himself knows, without making such knowledge evidence by giving his testimony in the usual way—see *ante*, page 68, and *Kishore Singh and others* v. *Ganesh Múkherji*, 9 W. R. Civ. Rul. 252: and *Rousseau and another* v. *Pinto*, 7 W. R. Civ. Rul. 190. "The statement of the Judge who presides at a trial, whether it be in a criminal or civil case, is, as to what took place at the trial, conclusive. Neither the affidavits of by-standers, nor of jurors, nor the notes of Counsel, nor of short-hand writers, are admissible to controvert the

[1] See also *The Queen* v. *Bholanath Sen*, I. L. R. 2 Calc. 23. When a Magistrate sitting with other Magistrates is a witness, or when he has himself initiated the proceedings, unless there is an absolute necessity for his doing so, he should abstain altogether from exercising judicial functions.

notes or statement of the Judge (*R.* v. *Grant*, 5 B. and Ad. 1081, 1807; S. C. 3 Ne & M. 106: *Everett* v. *Youells*, 4 B. & Ad. 683, 684: *Gibbs* v. *Pike*, 9 M. & W. 351). And in *Reg.* v. *Aaron Mellor* (27 L. J. N. S. 121 Mag. Cas.) Coleridge, J. at page 131, says:—'I apprehend that 'we are bound to give credence to the statement of the Judge, and to 'take what the Judge so states to be incontrovertibly the fact. It is sug- 'gested this is not a record, but we have no more power of contradicting 'the statement of a learned Judge reserved for our consideration than 'we have the power of contradicting any allegation upon a record: and Martin, B. (p. 137) says:—'We must consider the statement of the 'Judge as absolute verity, and we ought to take his statement precisely 'as a record, and act on it in the same manner as on a record of Court 'which of itself imports absolute verity' "—(*Reg.* v. *Pestanji Dinsha*, 10 Bom. H. C. Rep. 81).

As to jurymen or assessors, section 258 of the Code of Criminal Procedure enacts as follows:—"If a juryman or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be examined, cross-examined, and re-examined in the same manner as any other witness."]

When juryman or assessor may be examined.

122. No person, who is or has been married, shall be compelled to disclose any communication made to him[1] during marriage by any person to whom he[1] is or has been married; nor shall he[1] be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Communications during marriage.

["The protection," says Mr. Taylor, "is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all communications of whatever nature* which pass between husband and

Extent of the Protection.

[1] "Words importing the masculine gender shall be taken to include females"—section 2 of "General Clauses Act," I of 1868.

wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated 'during the marriage;' and consequently if a man were to make the most confidential statement to a woman *before* he married her, and it were afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter" (§ 830: and see 16th and 17th Vict. Cap. 83, section 3). The privilege continues even after the marriage has been dissolved by death or divorce. Where a woman, divorced and subsequently married to another man, was offered as a witness of a matter of which she had become cognizant during her first coverture, Lord Alvanley rejected the evidence, adding,—"It can never be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved." The words "has been married" in the above section of the Evidence Act give full effect to this dictum in India. Not merely is the married person *protected* from being compelled to disclose; but further, even if he be willing, he is not to be *permitted* to disclose any communication made during the marriage, *unless* the person who made it or his representative in interest consents, *except* in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. With this exception should be read section 120, *ante*.]

Exception.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Evidence as to affairs of State.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Official communications.

[The above two sections (123 and 124) as well as sections 121, 122, 125, 126, 127, 128, 129, 130, and 131 are applicable equally to oral and to documentary evidence (see definition of "Evidence," *ante*, and the second proviso to section 165, *post*).

Affairs of State.

The meaning of "affairs of State" will be rendered more intelligible by some account of the manner in which the rule has been applied in other countries. No witness, whether a peer, member of the House of Commons, officer of either House, or short-hand writer, can, without the permission of the House, be examined as to what took place within the walls of Parliament. On similar grounds, the official transactions between the *heads of the departments of Government and their subordinate officers* are in general treated as secrets of State. Thus communications between a Colonial Governor and his Attorney-General on the condition of the colony,[1] or the conduct of its officers, or between such Governor and a military officer under his authority; the report of a military commission of enquiry made to the Commander-in-Chief and the correspondence between an agent of the Government and a Secretary of State; or between the Directors of the East India Company and the Board of Control under the old law; or between an officer of customs and the Board of Commissioners—are confidential and privileged matters, which the interests of the State will not permit to be revealed. The proceedings of the *Grand Jurors* are in England regarded as privileged communications, and would doubtless have been so regarded in the Presidency towns before the abolition of the Grand Jury system. The testimony of *Petty Jurors* is, on similar grounds, inadmissible to prove *mistake* or *misbehaviour* in the jury in regard to the verdict. But the Court will admit evidence of such misconduct either from the officer in charge of the jury, or from some other person who actually witnessed the transaction. Communications between Collectors and Commissioners, and between Commissioners and the Board of Revenue, or the Government, would be within the rule in India. Instructions to settlement officers in the Panjáb not only fall within the rule as to privilege, but section 9 of Act XXXIII of 1871 enacts that no Court of Justice shall permit evidence to be given of the contents of such instructions. The President of the United States and the Governors of the several States are not bound in America to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would,

[1] As to communications of a defamatory nature sent by a foreign consul to his own Government, see *Robert, Charriol, and another* v. *Lombard*, 1 Ind. Jur. N. S. 192.

on public considerations, be inexpedient.[1] And the same doctrine, as it would seem, prevails in England, whenever Ministers of State are called as witnesses for the purpose of producing public documents. If, however, the Minister, instead of attending personally at the trial, should send the required papers by the hands of a subordinate officer, the Judge would probably examine them himself, and would compel their production, unless he were satisfied that on public grounds they ought to be withheld. In the case of *The Rajah of Coorg* v. *The East India Company* (20 Jur. p. 407) it was decided that, in a suit instituted against the East India Company to enforce *a private right*, the Company was not bound to produce certain documents, the possession of which they admitted, but resisted the production of them on the ground that some of them were political communications which, in the fulfilment of the political duty of the Company and its Governments in India, had passed between the Company and those Governments, solely with a view to the government of India, and to enable the Company to perform its duty in that behalf; and that the rest of them were political communications, which passed between the official agents of the Company in India in fulfilment of their public political duty, and for the purposes of the public government in India. It was also held in the same case, that the production of political documents depended, not on the question of the person called on to produce them being a party to the suit or not, but upon the danger to the public interests which would result from their production. *When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.* It has, however, been held that in an action of trespass brought against the Governor of a colony, a military officer under his control might be asked, in general terms, whether he did not act by the direction of the defendants, though the written instructions could not be given in evidence. In the case of prosecutions against the Governor-General of India or any member of Council, the 21 Geo. III, Cap. 70, section 5, provides for compelling the production of the order or orders in Council complained of, and for the examination of witnesses upon the matter of the complaint. Communications, though made to official persons, are *not privileged where they are not made in the discharge of any public duty;* such, for example, as a letter by a

[1] The New York Civil Code, § 1710, r. 5, enacts that "a public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure." The above section of the Evidence Act adopts similar language.

private individual to the Chief Secretary of the Postmaster-General, complaining of the conduct of the guard of the mail towards a passenger.[1]

Who is to decide as to whether the evidence shall be given.

It will be observed that it is not the Judge, but the public officer concerned, who is to decide as to whether the evidence referred to in sections 123 and 124 shall be given or withheld. This is in accordance with the rule laid down in the English case of *Beatson* v. *Skene*[2] as to documents connected with affairs of State. One of the Judges who decided that case was, however, of opinion that, when a Judge is satisfied that a document may be made public without prejudice to the public service, he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. The whole Court further were agreed that cases might arise where the matter would be so clear that the Judge might well ask for the document in spite of some official scruples as to producing it. A similar rule may, perhaps, be deduced in India from section 162, *post*, which makes no exception to the general provision therein contained, that the validity of any objection to produce shall be decided on by the Court. The second paragraph of this section is:—"The Court, if it sees fit, may inspect the document, *unless it refers to matters of State*, or take other evidence to enable it to determine on its admissibility." The position of the words italicised appears to show that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it *to determine on its admissibility*, and from this it may be inferred that it was intended to give the Court power to determine on such admissibility. "Evidence" includes *documents* as well as *statements*, but it may be questionable if the words "evidence derived from unpublished official records" in section 123 were meant to include the records or documents themselves. If this meaning were not intended, there is no provision in the Evidence Act corresponding to the rule laid down in "*Beatson* v. *Skene*."[2]

In cases tried with a jury, the Judge is to decide all questions as to the admissibility of evidence (see section 256 of the Code of Criminal Procedure). In *Beatson* v. *Skene*[2] it was held that, whenever the question, whether a communication was privileged or not, involves matter of fact, it should be left to the jury. Reading together sections 256 and 257 of the Code of Criminal Procedure, it may be doubtful if this rule would be held to be law in India.]

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[1] Tay. §§ 864, 865, 866.

[2] 6 Jur. N. S. 780; S. C. 29 L. J. Ex. 430.

125. No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

Information as to commission of offences.

["It is perfectly right," said Eyre, C. J. in Hardy's case,[1] "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed." The rule in England is that witnesses for the Crown will not be *permitted* to disclose the names of their employers or the nature of the connection between them, or the names of the persons from whom they received information or the names of the persons to whom they gave information. The above section merely enacts that no Magistrate or Police officer shall be *compelled* to say, but it does not prohibit him if he be willing to say, whence he got his information. It is wholly silent as to persons other than Magistrates or Police officers.]

126. No barrister, attorney, pleader, or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney, or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Professional communications.

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [illegal[2]] purpose;

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[1] 24 Howell's State Trials, 808.

[2] The word in brackets was substituted for "criminal" by section 10 of the amending Act, XVIII of 1872.

(2) Any fact observed by any barrister, pleader, attorney, or vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader,[1]] attorney, or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a.*) A, a client, says to B, an attorney,—'I have committed forgery, and I wish you to defend me.'

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b.*) A, a client, says to B, an attorney,—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c.*) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

[This section applies when a barrister, attorney, pleader, or vakil is the party interrogated as a witness: and it will be observed that he is not only privileged and protected from disclosing, but that, even if willing, he is not permitted to disclose, unless with his client's

Reason and Object of the Rule.

[1] The word in brackets was added by section 10 of the amending Act, XVIII of 1872.

express consent. "*Where the professional adviser is the party interrogated,*" says Mr. Taylor, "it is quite immaterial whether the communication relate to any litigation commenced or anticipated; for, as Lord Chancellor Brougham observed in a case of high authority,[1]—'If the privilege were confined to communications connected with suits begun or intended or expected or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous;' and again,—'This protection is not qualified by any reference to proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client or on his account and for his benefit in the transaction of his business—or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client,—they are not only justified in withholding such matters, but *bound to withhold* them, and will not be compelled to disclose the information or produce the papers in any Court of Law or Equity, either as party or as witness. The foundation of this rule is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford *them* protection. But it is out of regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings.' If such communications were not protected, no man, as the same learned Judge remarked in another case,[2] would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a Court, either to obtain redress or to defend himself"—(§§ 834, 835.)

The Illustrations should be read in connection with the *proviso*. As to *Illustration* (*c*), see *Brown* v. *Forster* (1 Hurlstone and Norman's Rep. 736). The substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso by the amending Act (XVIII of 1872) carries the principle somewhat further than what can be said to be established law in England, but is in conformity with the expressed opinion of several able Judges. In *Russell* v. *Jackson* (9 Hare's Chancery

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[1] *Greenough* v. *Gaskell*, 1 Mylne and Keene's Chancery Rep. 103.

[2] *Bolton* v. *Corporation of Liverpool*, 1 Mylne and Keene's Chancery Rep. 94—95.

Rep.) Turner, V. C. said:—"I am very much disposed to think that the existence of an *illegal purpose* would prevent any privilege attaching to the communications. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor: and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." In *Follett* v. *Jefferyes* (1 Simon's Chancery Rep. N. S. 17), Rolfe, V. C. observed:—"It is not accurate to speak of cases of fraud, contrived by the client and solicitor together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to *all which passes* between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor."[1]

Object and meaning of the proviso.

Can the barrister, attorney, &c. be asked whether the communication was or was not made in furtherance of an illegal purpose? "It seems," says Mr. Taylor, "that the legal adviser *cannot be asked* whether the conference between him and his client was for a lawful or an unlawful purpose; though if from independent evidence it should clearly appear that the communication was made by the client for a cri-

[1] The same principle has been followed in America. In the case of *People* v. *Mahon* (1 Utah, 205) the defendant was indicted for forging a promissory note. At the trial an attorney-at-law was called as a witness, and the public prosecutor offered to show by him that, before the note in question was made, defendant went to the witness and asked him what would be the effect of making a note and signing another man's name to it to raise some money, and proposed to do so. The witness stated that what knowledge he had was obtained professionally, and the defendant's counsel objected to the communication, claiming it was privileged. The Supreme Court of Utah held it admissible, saying that while the general rule is that confidential communications between client and attorney are not to be revealed at any time, such rule applies only to all communications "touching matters that come within the ordinary scope of professional employment," and that the communication in issue was not within such scope. The rule, however, has been held to cover a very wide range, being said to extend to every communication which the client makes to his legal adviser for the purpose of professional advice or aid, and that the seal of the law once fixed upon them remains for ever, unless removed by the party himself in whose favour it was placed even though the interests of criminal justice may seem to require the production of the evidence (*Rex* v. *Dixon*, 3 Burr. 1687: *Anon.* 3 Mass. 870). It has, however, been held that the rule was limited to communications having a lawful object, because it is not a solicitor's duty to contrive fraud or to advise his client as to the means of evading the law (*Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528).

minal purpose, as for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project." (§ 833.) Having regard to section 132, *post*, and to the general tenor of the whole Act, it may be doubtful whether an answer to the question would not be compelled in India.

Who are within the Rule.

The above section only mentions *barristers*, *attorneys*, *pleaders*, *and vakils*. It may be a question how far the privilege will extend to so-called legal practitioners *in this country*, who do not fall within the above enumeration. That *mukhtars* are not within the rule was decided by the Calcutta High Court under section 24 of Act II of 1855; and the reasons given for the decision equally apply to the language of the present section (*The Queen* v. *Chandrakant Chakravartti*, 1 B. L. R. A. Crim. 8: and see 9 W. R. Crim. Let. 10). The protection is in England extended to all the necessary organs of communication with the legal adviser, *e. g.* interpreters, intermediate agents, attorney's town or local agent or clerk, foreign counsel, and even to a gentleman sent out to India to act as a solicitor's agent in collecting evidence respecting a pending suit. Some of these are expressly declared to be within the rule in India by section 127, *post*, Q. V. Medical men, clergymen, clerks, bankers, stewards, and confidential friends, even an attorney friend, when consulted as a *friend* and not as an *attorney*, are, however, not within the rule. But where a person was consulted confidentially under the erroneous impression that he was an attorney, it would seem that the privilege attached.

Where an attorney, in violation of his duty, communicated the contents of an instrument entrusted to him, this secondary evidence was received after notice to produce the original had been duly given; and it has been several times laid down in England that the mere fact of papers and other subjects of evidence having been *illegally taken* from the possession of the party against whom they are offered, or *otherwise* unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue; for the Court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question. Where the same attorney is employed by two parties, the test is,—"was the communication made by the party to the witness in the character of his own *exclusive* attorney?"—If it was, the bond of secrecy is imposed on the attorney called as a witness; if it was not, the communication will not be privileged. If an attorney acting for both parties has an offer made

to him by the one for communication to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party. But if an attorney, acting for one party, by the direction of his client makes a proposal to the opposite party, though he may be compelled to disclose what he stated to that party, he cannot divulge what his own client communicated to him. The protection does not cease with the termination of the suit or business in which the communication was made, nor yet with the death of the client. *The seal of the law remains for ever*, unless removed either by the party himself, or perhaps by his personal representatives after his death (see the *Explanation* to the section). Where, however, the client who made the communication is dead, and the litigating parties both claim under him, it would be obviously unjust to determine that the privilege shall belong to the one claimant rather than to the other. Either of them, therefore, can call the attorney as a witness. Other exceptions, which have been recognized by English law, are—where the knowledge was not acquired by the attorney *solely* by his being employed professionally, but was in some measure obtained by his *acting as a party*, more especially if the transaction were fraudulent;—where the communication was made *before* the attorney was employed as such, or *after* his employment had ceased;—where it had no reference to professional employment;—and all cases in which the attorney was acting not as such, but in some other character, as, for instance, in that of a subscribing witness. There is also no privilege where *unnecessary communications* have been made by the client. A prosecutor's attorney was allowed to state that his client mentioned to him that he would give a large sum to have the prisoner hanged. An attorney or other legal adviser may also be called to prove his client's handwriting, or to identify him as the person who verified a plaint or executed a múkhtarnámá or vakálutnámá; but he cannot be asked whether a document entrusted to him was duly stamped or had an erasure upon it.

Exceptions to the Rule.

"*Unless with his client's express consent*"—The privilege is that of the client: he may *expressly* waive it, or he may do so by calling the barrister, pleader, attorney, or vakil as a witness, and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege by giving evidence in the suit *at his own instance*, or if he be compelled to give evidence at the instance of another party (section 128). It will be observed that section 126 applies *only when the barrister, pleader, attorney, or vakil is the person interrogated.* Section 129 applies *where the client is interrogated*, and whether such client be *a party to the case* or not. Mr. Taylor remarks

Privilege of Client.

that "*the rule of protection has not been laid down in equally broad terms where the client himself is the party interrogated.* It has, indeed, been established that, in this event, all communications between the solicitor and client, whether pending and with reference to litigation, or *made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation*, though not in contemplation of, or with reference to, that litigation, are protected: as also are communications made respecting the subject-matter in question, pending or in contemplation of litigation on the same subject with other persons, with the view of asserting the same right. *If*, however, communications pass between a client and solicitor *before any dispute has arisen* between the client and his opponent, the opponent can compel the client by a bill in equity to disclose these communications, although they relate to matters which form the subject of the suit, except so far as they contain mere legal advice and opinions"— (§ 845). Mr. Taylor goes on to add that the case of *Radcliffe* v. *Fursman*,[1] in which this doctrine was propounded by the House of Lords, has, however, been generally disapproved of since; and, referring to Lord Justice Knight Bruce's argument in the case of *Pearse* v. *Pearse*,[2] he adds, that, if the view there expressed be correct, it may still be urged with success that if a man, with relation to his own private and exclusive interests merely, upon a point upon which he owes no fiduciary duty to another, lays a statement before counsel for his professional advice, he cannot be compelled afterwards to disclose it, although at the time no suit or dispute was in existence—(§ 847). This view was approved in *Minet* v. *Morgan* (L. R. 8 Ch. App. 361), where all the authorities were reviewed, and the explanation of *Radcliffe* v. *Fursman* given in *Pearse* v. *Pearse* adopted. See also *Manser* v. *Dix*, K. & J. 451; and *Mostyn* v. *The West Mostyn Coal and Iron Company*, 34 L. T. Rep. N. S. 573. The following passage from Lord Brougham's judgment in *Greenough* v. *Gaskell*[3] may also be borne in mind:—"We are here to consider not the case which has frequently arisen in Courts of Equity, and more than once since I came into this Court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so has, at different times, been a matter of controversy; and in two cases before Lord Lyndhurst, and once since I sat here, the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor

[1] 2 Brown's Parliamentary Cases, 514.

[2] DeGex and Smale's Chancery Rep. 18—31. See further on this subject the Note to section 129, *post*.

[3] 1 Mylne and Keene's Chancery Rep. 103.

in the suit pending, or with reference to that suit when in contemplation. But the party has no *general* privilege or protection: he is bound to disclose all he knows and believes and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he had laid before counsel for their opinion, *unconnected with the suit itself* . . . . To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, *not being his professional advisers*, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business and the defence or prosecution of men's rights by the aid of skilful persons. *To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it.* But no authority sanctions the much wider violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which but for their employment as professional men they would not have become possessed of." The question how far a client, whether a party to the case or not, can be compelled, when examined as a witness, to disclose communications, which passed *ante litem motam* between him and legal advisers, has but recently been settled in England, as will appear from the authorities above referred to. Section 129, *post*, lays down a fair and reasonable rule for India. It enacts that the client shall not be compelled to disclose any confidential communication which has taken place between him and his legal professional adviser *unless he offers himself as a witness*, and even then he can be compelled to disclose such communications only as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others. If he do not offer himself as a witness, if he be summoned in the usual way without his offering himself, his privilege is absolute.

See, in connection with this section, the *Explanation* to section 23, *ante*.]

Section 126 to apply to interpreters, &c.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.

[See *ante*, page 548. The extension of the protection to interpreters is particularly important in a country like India in which there are so many races speaking different languages: and in which the most important portion of the administration of justice is conducted in a foreign language.[1]]

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, [pleader[1]], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence.

[The client does not "waive his privilege," says Mr. Taylor, "by calling the attorney as a witness, unless he also examines him in chief to the matter privileged; and, even in that case, it has been held in Ireland that the cross-examination must be confined to the point upon which the witness has been examined in chief"[2] (§ 849). Section 128 restores the rule followed in England, contrary to which section 24 of Act II of 1855 had enacted that, if a party to a suit gave evidence therein at his own instance, he should be deemed thereby to have waived his privilege and to have consented to the disclosure by the barrister, attorney, or vakil of any matter which might be relevant.

With reference to the words "*if any party to a suit or proceeding calls any such barrister, &c.*" it may be observed that there was not under the old law, and is not under the new Act, anything to prevent an attorney or other professional person who is acting as advocate for either of the parties to a suit and pleading the case in Court, from being examined as a witness in the same case (*Ramfal Shaw* v. *Biswanath Mandal and others*, 5 B. L. R. App. 28: and see *Cobbett* v. *Hudson*, 1 Ellis and Blackburn's Rep. Q. B. 11, there referred to). Such a practice is, however, regarded with disfavour.]

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[1] The word in brackets was added by section 10 of the amending Act, XVIII of 1872.

[2] On this point see section 138, *post*, and the Note thereto.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Confidential communication with legal advisers.

[The provisions of the Indian Evidence Act upon the subject of *privileged communications* have been recently rendered more important in consequence of the introduction into the Civil Procedure Code of certain sections providing for *discovery*, a branch of procedure hitherto little if at all used or understood in the Mufassil. As this work is more especially intended for the use of Mufassil practitioners, who have not the training or knowledge of English lawyers, I think it will be useful to give some account of the meaning and object of *discovery*, to explain the intention of the new sections of the Code of Civil Procedure, and (in accordance with the plan hitherto pursued) to illustrate the subject by a brief history of the principle and a reference to the most important cases which have settled the limits of its application. When two parties are engaged in litigation, it may so happen that certain *facts* are within the knowledge, or certain *documents* in the possession, of one party, which facts or documents would materially assist the case of the other party, if he possessed a knowledge of the former or were aware of the contents of the latter. Each party is bound, upon the demand of his opponent, to reveal any facts within his knowledge, and grant the inspection of any documents in his custody or power, which are material to the case of such opponent, always excepting those which are the subject of the exceptional rules as to privilege; and the right to compel an opponent to reveal such facts or grant the inspection of such documents is termed the right to obtain discovery. In the Roman law, bills of discovery were of two kinds: (1) *Actiones ad exhibendum*, for the production of things, or deeds, or documents; (2) *actiones interrogatoriæ*, which required the answer of the party on oath to interrogatories. At first *interrogatory actions* could be propounded before a suit was brought by a party having an interest; but in Justinian's time they were allowed only after such an action had been actually commenced. As the parties to a suit could not formerly be called as witnesses, the Courts of Common Law in

Meaning and object of Discovery.

England had no power to compel a complete discovery of material facts by the oaths of the parties: and they also had no power to compel the production of deeds, books, writings, and other things in the custody or power of one of the parties, and material to the right, title or defence of the other. Formerly the only remedy for this defect was to file a bill for discovery in the Court of Chancery. This bill was usually not a bill for relief, but, like the similar action at Roman law, was in aid of the jurisdiction of the Court which was to deal with the actual subject-matter of litigation. It stated the matter in respect of which the discovery was sought, the interest of the plaintiff and defendant in the subject, and the facts and circumstances upon which the right of the plaintiff to require the discovery from the defendant was founded, and prayed that the defendant might make a full discovery of the matters therein stated. The two cardinal principles upon which this bill was dealt with were: (1) that, as a general rule, the plaintiff, who filed such a bill, was entitled to exact from the defendant a discovery upon oath as to all matters of fact which were material to the plaintiff's case about to come on for trial, and which the defendant did not by his form of pleading in such case admit; (2) the right of the plaintiff to the benefit of the defendant's oath was limited to a discovery of such material facts as related to the plaintiff's case, and did not extend to a discovery of the manner in which the defendant's case was to be exclusively established or to the evidence which related exclusively to such case. Under this procedure a party who desired to obtain discovery from his opponent was subjected to the delay and expense of a double set of legal proceedings.

Modern progress, which has recently effected the fusion of law and equity in a single Court, was not slow to acknowledge these defects in the administration of justice and to devise a remedy: but, owing to the opposition of legal conservatives, the remedy was afforded only by instalments. The first instalment was afforded by Lord Brougham's Evidence Act of 1851, 14 and 15 Vict. Cap. 99. The sixth section of this Statute empowered the Courts of Common Law, when any action or legal proceeding was pending therein, upon application made for such purpose by either of the litigants, to compel the opposite party to allow the party making the application *to inspect all documents in the custody or under the control of such opposite party, relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same*, or to procure the same to be duly stamped in all cases in which, previous to the passing of the Act, a *discovery* might have been obtained by filing a bill, or by any other proceeding in a Court of Equity. The object to be attained by *discovery* may be said

14 and 15 Vict. Cap. 99, S. 6.

to be *three-fold: first*, to obtain a knowledge of material facts; *secondly*, to ascertain the existence and description of writings supposed to be in the possession of the opposite party; *thirdly*, to obtain a knowledge of the contents of such writings. Lord Brougham's Act dealt with the last of these objects only. The second object was provided for three years afterwards by the 17 and 18 Vict. Cap. 125, the 50th section of which enacted that, upon the application of either party to any cause or other civil proceeding in any of the superior Courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object, and if so, on what grounds, to the production of such as are in his or their possession or power; and upon such affidavit being made, the Court or Judge may make such further order thereon as shall be just.

Common Law Procedure Act of 1854, 17 and 18 Vict. Cap. 125, S. 50.

The first of the above three objects was affected by the 51st section of the same Statute, which enacted thus:—"In all causes in any of the superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them, by leave of the Court or a Judge, may at any other time deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly." The object of these provisions was to confer upon the Courts of Common Law powers of enforcing *preliminary discovery*, and thus to save suitors from the necessity of filing a bill in equity to compel the disclosure of facts exclusively within the knowledge of their adversaries. The Common Law Commissioners thought that such

provisions would tend to make the matters in controversy more clearly manifest; would save the one party the trouble and expense of producing evidence of facts which the other party may be ready to admit; would occasionally obviate the necessity of any trial by compelling either the one party or the other to admit facts decisive of the case upon its merits; would tend to expose the motive of groundless actions brought for vexation and of unfounded defences set up and persisted in for delay; would have a wholesome effect in preventing false pleas from being put on the record; and would aid the Courts in extirpating frivolous and improper litigation. These provisions are now, with some slight modifications, in force in the Supreme Court established by the Statutes 36 and 37 Vict. Cap. 66, and 38 and 39 Vict. Cap. 77.—See, as to *interrogatories*, Order XXXI, rules 1—10; as to *discovery of documents*, same order, rules 12—13; and as to *inspection of documents*, same order, rules 14—18; and see also same order, rules 19—23.

Similar provisions have been inserted in the Indian Code of Civil Procedure. Section 121 enacts that any party may at any time, by leave of the Court, deliver through the Court interrogatories in writing for the examination of the opposite party, or, where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer, *provided* that no party shall deliver more than one set of interrogatories to the same person without the permission of the Court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered a written statement and such statement has been received and placed on the record. The further procedure relating to interrogatories is contained in the following sections, 122—127. Section 129 enacts that the Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power, relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order. Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce together with the grounds of such objection. Section 131 enacts that every party to a suit may, at any time before or at the hearing thereof, give notice through the Court to any other party, in whose plaint, written statement, or affidavits reference is made to any docu-

Provisions of the Indian Code of Civil Procedure as to—

I.—Interrogatories.

II.—Discovery of Documents.

III.—Inspection of Documents.

ment, to produce such document in the presence of such officer as the Court appoints in this behalf, for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof. No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice. Finally section 136 enacts that, "if any party fail to comply with any order under this chapter to answer interrogatories or for discovery or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered: and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly. Any party failing to comply with an order under this chapter to answer interrogatories or for discovery or inspection, which has been served personally upon him, shall also be deemed guilty of an offence under section 188 of the Indian Penal Code."

Consequence of failure to answer interrogatories or give discovery or inspection of documents.

I shall now endeavour to illustrate the subject of discovery by referring to some of the most important cases in which questions of privilege have been raised and decided. In *Greenlaw* v. *King*,[1] the Rector of a benefice, being empowered by an Act of Parliament to borrow money by way of annuity with the consent of the Bishop for the purpose of building a new rectory-house, borrowed £2,000, which was really the money of the Bishop, though lent by another person acting as his trustee. The annuity granted by the Rector in consideration of this loan was assigned by the Bishop to his son, Mr. K. After the death of the Bishop and the Rector, a subsequent Rector filed a bill in equity to set aside the annuity as invalid by reason of the trust reposed in the Bishop. In 1820, the Bishop had a correspondence with his solicitor, L, with respect to the validity of the transaction, and a case was submitted for the opinion of counsel. The assignment of the annuity to Mr. K was made in 1823. The Bishop died in 1837. The correspondence between the Bishop and his solicitor, L, and the case submitted to counsel had come into the hands of the defendant Mr. K, who was called upon to produce them, and it was held that he was bound to do so. Lord Langdale, Master of the Rolls, said:—"The production is resisted on the ground that the communications were confidential and

[1] 1 Beavan 137.

ought to be protected. I am surprised at the extent of the protection from discovery which is sometimes claimed. The general rule of the Court is, no doubt, that what the defendant knows relating to the matters in question the plaintiff has a right to know also, and for this very purpose to prevent the defendant from suppressing within his own breast the matters material to the determination of the question between the parties. A defendant may resist a just demand, knowing from circumstances solely within his own knowledge such resistance on his part to be unjust: this would be a fraud, and could only be prevented by a discovery. The defendant, on the other hand, by filing a cross bill, has a right to know all that the plaintiff knows and may be material for his defence; this is one of the great distinctions between Courts of Equity and the other Courts in this country; here you can appeal to the conscience of a party and obtain information; to extend the protection from discovery further than is absolutely necessary, would be to cripple the jurisdiction of Courts of Equity in the most important particular. But there are exceptions to the general rule, and one is, where knowledge of the fact has been communicated between the party and his solicitor; and it has been argued that in every case, in which a solicitor is bound to conceal his knowledge, the client himself ought to be protected from making such discovery. I do not accede to that proposition; there are many cases in which it would be contrary to the duty of a solicitor to disclose facts, of which, upon a bill being filed in this Court, the client would be bound to make a discovery. This shows that the two propositions are not co-extensive; the solicitor may not be bound or not permitted to disclose matters which come to his knowledge as a solicitor, and yet the client may be bound to disclose them. It is decided that, if the knowledge of the client be obtained through his solicitor, there may be a protection; but in this case it is apparent that the knowledge of the defendant has not come to him through his solicitor." The same defendant was also compelled to produce certain correspondence which had passed between him and L as his agent and confidential adviser though not as his solicitor. Lord Langdale said:—"If these letters had been written to L for the purpose of being communicated by that channel to counsel, another question might have arisen;—I might have thought it subject to a different rule; but it is not so: they are communications which have taken place between the defendant and L not in his character of solicitor; and it cannot be said that a mere friend is a person so confidential that a communication with him is privileged: the cases of privilege are confined to solicitors and their clients; and stewards, parents, medical attendants, clergymen and

persons in the most closely confidential relation are bound to disclose communications made to them. How can it be said that a mere friend is not equally bound?"

In *Smith* v. *Daniell*[1] it appeared from copies of letters written before the litigation by the plaintiff to one of the defendants that the former had taken (1) opinions of Counsel, and (2) the friendly opinion of Lord Westbury, then an ex-chancellor, on points which afterwards became part of the subject-matter of the litigation. In answer to an application to produce these opinions, and the cases on which they were founded, plaintiff objected that "they were written in anticipation of and in relation to the litigation." He did not say they were confidential communications. It was held by Sir James Bacon, V. C. that he was bound to produce both classes of documents.

In *Goodall* v. *Little* (20 L. J. Chancery 132) plaintiffs, assignees of a bankrupt firm at Teneriffe, filed their bill against the defendants, three brothers, one of whom managed the business of the Teneriffe firm, for an account of certain remittances forwarded by the manager of the Teneriffe firm to his brother as agent in London. The defendant the London agent, set up as a defence certain proceedings in the Lord Mayor's Court, instituted by the third defendant as executor of his father, under which the moneys in the hands of the agent of the Teneriffe firm were attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents, it was held that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged; that letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Teneriffe firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors with a view to the litigation in this suit, were not privileged. Lord Cranworth, V. C. said:—"On the question whether the defendants are entitled to withhold production on the ground of the documents being privileged, I shall act on the doctrine as laid down by Lord Lyndhurst in *Hughes* v. *Biddulph*. There, in answer to a motion for production of documents, an affidavit was made by the defendant that many of the papers and letters were communications which had passed between her and her country, solicitor, Mr. D, or her town solicitor, Mr. W, or between Mr. D and Mr. W. Upon a motion for production, Lord Lyndhurst stated his opinion to be, that confidential communications between the

[1] L. R. 18 Eq. 649.

defendant and her solicitors, or between the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected; and he accordingly made an order for production of all except such as the defendant should by affidavit bring within such an exception." He then proceeded to point out that, in applying this rule to the case before him, it was to be observed that the letters were all written *either pending or in contemplation of the litigation in the suit* and with reference to the matters brought into controversy therein; that this clearly brought them within the rule of privilege so far as their subject-matter was concerned, and the only question then was whether they passed between parties and under circumstances to which the privilege was applicable. He then classified them under three heads: (1) letters to the defendant William from his solicitor; (2) letters from the attorney in the Lord Mayor's Court to the solicitors of Archibald; (3) letters from James at Teneriffe to William, written for the purpose of their being communicated to the solicitor of the defendant William, with a view to his defence. The first and second classes were held privileged. The third class was held not to be privileged. "The letters in that class," said the Vice-Chancellor, "are letters from one co-defendant to another, and it is quite unimportant that they were written with a view to enable the party to whom they were addressed to consult his solicitor upon them. That which might pass between William and his solicitor, on the subject of those letters, would be protected; but there is no protection as to letters passing among parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they are sent to communicate them in professional confidence to the solicitor. This case is clearly distinguishable from *Steel* v. *Stewart*, where Lord Lyndhurst held that letters sent from India to the defendant in order to be laid before his solicitor were protected. That decision proceeded on the ground that the person who wrote the letters was an agent of the solicitor sent out to procure evidence, and his letters were therefore in the same position as letters from the solicitors themselves would have been in."

In *The Chartered Bank of India, Australia and China* v. *Rich*, (4 B. & S. 73; 32 L. J. (Q. B.) 300), which was an action for alleged breaches of an agreement between a banking company carrying on business, amongst other places, at Bombay, and the defendant, who had been their agent there, an order was made under the Common Law Procedure Act, 1854, 17 & 18 Vict. Cap. 125, S. 50, for discovery of

documents relating to the matter in dispute. The secretary of the plaintiffs' banking company made an affidavit stating that the letters specified in the schedule attached to the defendant's affidavit consisted of communications between the head office of the plaintiffs' bank in London and their offices at Bombay, not forming part of the *res gestæ*, but written after the defendant had left the service of the bank and the dispute in question in the cause had arisen; being on the one part instructions given and inquiries made with the view of obtaining the information required to enable the plaintiffs to decide as to the mode of proceeding against the defendant, several of them having been written under the immediate direction and advice of the attorney for the plaintiffs; and on the other part their officers' reports and replies specifying the evidence which could be adduced in Bombay to prove the breaches of contract complained of; and that the same could not be material to the defendant with a view to establishing his case. The defendant made an affidavit of his belief that this correspondence was material to his defence. It was decided that all this correspondence was confidential communication, and that the defendant was not entitled to inspect it. Cockburn, C.J. said:—"The true doctrine on this subject is clearly and admirably stated by Pollock, Chief Baron, in his judgment in *Hunt* v. *Hewitt*[1]—'The right of a plaintiff 'in equity is limited, *first*, to a discovery confined to the questions in 'the cause; *secondly*, of such material documents as relate to the 'proof of his, the plaintiff's, case on the trial; and does not extend to 'the discovery of the manner in which the defendant's case is to be 'established, or to evidence which relates exclusively to his case.' .... I find no authority for saying that communications between one of the litigant parties and their attorney or their agent, which are of a confidential character, are to be produced to the opposite party for inspection simply to enable him to see whether there is anything in the case of his opponent which is inherently weak, or which will enable him to make out his own case." Blackburn, J. said:—"The practice of the Court and of the Judges at Chambers has been to inquire what, from the nature of things and of the facts in the particular case, would tend to further the ends of justice; and looking at all the circumstances, and exercising a sound and rational discretion, to order the inspection of those documents which appear to be *material to the case of the party applying*. In the present case all the documents, after a particular date, fall within the principle of communications by an attorney or of matters done by, and communications made through, an agent of the attorney, or of matters which would

[1] 7 Exch. 236, 244.

have been done by an attorney but for the distance of the place occasioning the necessity of employing an agent. But there are several documents written previously to the date at which an attorney was consulted. The plaintiffs, being about to consult their attorney, write out and get from abroad these documents, which are rough notes from which a statement was to be made and laid before him. As to these we have a discretion, and I think we ought not to grant inspection. If I thought that the present case was like *Colman* v. *Freeman*,[1] in which there was a question whether there had been fraud committed by the plaintiffs and their agents in India, I might be of a different opinion."

The case of *Woolley* v. *North London Railway Company* (L. R. 4 C. P. 602) was an action for a personal injury sustained by a passenger on the railway. Inspection was allowed of the following documents:—*viz.* (1) a report of one of the defendants' inspectors to the general manager as to the accident in respect of which the action was brought; (2) a report of the guard of the train to which the accident happened; (3) a report of the defendants' Locomotive Superintendent to the general manager as to the accident,—upon the ground that they were reports or communications made by the agents of the company in the ordinary course of their duty for the purpose of conveying to the company information upon the subject, and were not opinions obtained confidentially with a view to litigation; and this without reference to whether they were made before or after the commencement of litigation. The Court also allowed inspection of (4) a copy of a letter written by the defendants' general manager to the secretary of the Board of Trade (pursuant to the 3 & 4 Vict. Cap. 97, S. 3) as to the accident; (8) a guarantee (dated seven years before the plaintiff's injury occurred) of materials for locomotive engines, part of which at the time of the accident formed a portion of the engine of the train in which the plaintiff was injured—upon the ground that they might be evidence for the plaintiff, and were not privileged: and (10) so much of the entries in the minute books of the locomotive stores and traffic committee, relating to the accident, as were not entries of communications between the defendants and their legal advisers, or the result thereof. Inspection was, on the other hand, refused of (5) reports to the defendants' Locomotive Superintendent from scientific men consulted by or on behalf of the defendants with reference to the cause of the accident; and (7) report to the defendants' attorneys from one of the scientific men consulted on behalf of the defendants with reference to the cause of the accident—upon the ground that they were privileged.

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[1] 3 H. & N. 871.

Byles, J. said:—"Where reports of this kind are made in the course and as part of the duty of the officer, whether an action is pending or not and whether it contains facts or opinions, they must be produced; but if they are made confidentially and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged." Brett, J. said:—"It seems to me that the rule may be thus stated:—any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced; but, if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is, whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation."

The case of *Fenner* v. *The London and South-Eastern Railway Company* (L. R. 7. Q. B. 767) was an action for late delivery and defective condition of cattle carried by the defendants upon their railway for plaintiff. The documents, of which inspection was sought, were letters and reports which had passed between the company's servants upon the subject of the litigation after the company's manager was aware that litigation was probable. Inspection was resisted on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of, or with a view to, litigation and resisting the plaintiff's claim. It was, however, decided that these documents were relevant to the question in dispute, that they fell within the general rule as to a litigant being entitled to a discovery of all the documents in his adversary's possession relevant to his case, and that they were not privileged as falling within any of the exceptions. Blackburn, J. said:—"There is no doubt that, on grounds of public policy, the communications between a person and his solicitors and counsel, with a view to obtain legal assistance and advice, are privileged; and, so far as the communications made with a person not himself a solicitor can be considered as made with him as deputy to the solicitor, they are also privileged (*Steele* v. *Stewart*)[1], and this, I apprehend, is a positive right of the client which the Court cannot deprive him of.

[1] 1 Phil. 147.

But when the communications are made with a person not in any way connected with the legal advisers of the defendant, the question is one of much more difficulty. In the case of *Greenlaw* v. *King*,[1] Lord Langdale went so far as to order the inspection of the correspondence between the defendant and a gentleman called Leigh, who had been his late father's solicitor with respect to the matters in controversy, and who continued to act as the agent and adviser of the defendant, though not as his solicitor, giving as his reason 'they are communications 'which have taken place between the defendant and Leigh, not in his 'character of solicitor, and it cannot be said that a mere friend is a 'person so confidential that a communication with him is privileged.' This is certainly a strong authority for this proposition, that the Court has power to order such an inspection; and accordingly a Court of Common Law has, in cases where it was of opinion that justice required such an inspection, ordered it (*Colman* v. *Trueman*,[2] *Baker* v. *London and South-Western Railway Company*).[3] But it has been held that a Court of Common Law, at least, has not a mere ministerial duty to order an inspection of documents admitted to be relevant and not brought strictly within the privilege of professional advice (*Chartered Bank of India* v. *Rich*);[4] and this was acted upon in *Woolley* v. *North London Railway Company*,[5] in which case the Court ordered the inspection of those reports which they thought, though made after litigation, were not in the nature of proofs for the trial, and refused the inspection of the reports of the scientific witnesses, which they thought were of that nature. It is obvious that whenever—to borrow the language of Willes, J. in *London Gas Company* v. *Chelsea*[6]—'the case comes very 'near the dividing line at which the province of discovery ceases,' there is a chance that different minds may come to opposite conclusions as to how the judicial discretion should be exercised. *The principle, however, I think, to be derived from all the cases is,* that where it appears that the documents are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the inspection. Where the documents fall short of that, it should, as a general rule, be granted. It must often be difficult, on the materials before a Judge, to determine

[1] 1 Beav. 137; *ante*, pp. 557-558.
[2] 3 H. & N. 871; 28 L. J. (Ex.) 5.
[3] L. R. 3 Q. B. 91.
[4] 4 B. & S. 73; 32 L. J. (Q. B.) 300; *ante*, pp. 560-561.
[5] L. R. 4 C. P. 602; *ante*, pp. 562-563.
[6] 6 C. B. (N. S.) 411; 28 L. J. (C. P.) 257.

within which class particular documents fall. A convenient course is often pursued at Chambers by producing the documents for the inspection of the Judge, who can generally at a glance see if they ought to be produced. This can only be done by consent, as the party asking for discovery does not see the documents, and the Judge cannot act on *ex parte* evidence without consent. But that consent is, I believe, never refused. In the present case no such offer was made on the part of the defendants, who stood on the ground that all written questions asked and written answers given after litigation was threatened, and not made in the ordinary course of duty of the person making them, were privileged. *Woolley* v. *North London Railway Company*[1] is an authority that a report sent by the subordinate to his superior, in consequence of a general order to report, is not privileged whether it was made before or after the litigation began; and I cannot think that such a report would be the more privileged because it was specially asked for. It is to be remembered that the principle now contended for is not confined to railway companies. It would apply to all cases, and would privilege the answer of a mate of a vessel to whom the shipowner had written to say that there was a complaint of short delivery of goods and requesting an explanation; and many other mercantile cases which might be suggested. I think to lay down any such principle would greatly diminish the benefit to be derived from discovery." Quain, J. concurred. Hannen, J. agreed in the general principles laid down by Mr. Justice Blackburn; but in the exercise of his discretion would have drawn the inference that the great bulk of the letters written by the servants of the company after the inquiry were privileged, though there might be some slight objections.

In an action for not delivering goods according to contract, the defendant, before selling the goods to the plaintiff, had purchased them from a certain company. Shortly before the commencement of the action two letters from the plaintiff's solicitors relating to the claims made in the action had been sent by the defendant to this company's agents with a request that they would obtain information respecting these claims; and thereupon a number of letters passed between such defendant and such agents, some of them after the action was brought. As a result of this correspondence, the defendant received a large compensation from the company. It was held that this correspondence did not come within any of the exceptions, and that plaintiff was entitled to inspect it. Cockburn, C. J. said:—"I think it just and reasonable that the plaintiff, as far as possible, should be put in possession of all the facts of the case; and, if this information is in the

[1] L. R. 4 C. P. 602; *ante*, p. 562.

breast of the defendant, it is right that it should be disclosed. The plaintiff could obtain this information from the defendant by cross-examination at the trial; and then, if necessary, apply to have the trial postponed; but this would be obviously inconvenient: or perhaps he could obtain it by interrogatories, but it is very undesirable that he should only be able to learn by long interrogatories what he could at once find in the correspondence itself. This correspondence may probably not be legal evidence, but the facts which it contains are facts which may probably be evidence, and which ought to be brought to the knowledge of the plaintiff." Blackburn, J. concurred, remarking:—"The general rule as to the discovery of documents is laid down in *Fenner* v. *London and South-Eastern Railway Company*, that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case, subject to the exceptions: *first*—which is an exception by right—of communications between a person and his solicitors and counsel with a view to obtain legal assistance and advice; and *secondly*—an exception which is in the discretion of the Court to allow—of communications made with a person not himself a solicitor, but which can be considered as made with him as deputy for a solicitor." Now the Courts of Exchequer and Common Pleas, in the exercise of this discretion, have gone further than this Court in refusing applications for inspection, and it is not for me to say which course is right. But in the present case the correspondence is in no sense the work of an attorney. It consists of independent communications with third persons, which ended in the defendant receiving large compensation, and I do not see why the plaintiff should not see them. Whether, under the new practice, we have a discretion to refuse inspection in cases where a Court of Equity has been in the habit of granting discovery, is a point which we need not decide at present, but which may probably at some time come before the Court of Appeal. It is enough to say that the present case is not brought within any of the exceptions which have hitherto been allowed (*English* v. *Tottie*, L. R. 1 Q. B. 141).

When the defendants, in order to ascertain whether or not they ought to yield to a claim by the plaintiffs for damages for personal injuries alleged to have been sustained in an accident on the defendants' line of railway, sent their medical officer, before litigation commenced or was formally threatened, to report to them upon the nature of the plaintiffs' injuries, it was held that the reports of such medical officer were privileged, and that plaintiffs were not entitled to have inspection of them (*Cossey and wife* v. *The London, Brighton and South Coast Railway*, L. R. 5 C. P. 146, distinguished from *Baker* v. *London and*

South-Western Railway Company, L. R. 3 Q. B. 91). Bovill, C. J. said:—"Complaint had been made to the company, and the investigation took place with the view of compensating the plaintiffs. I think the facts clearly bring the case within *Chartered Bank of India* v. *Rich*, and *Woolley* v. *North London Railway Company*, which protects the party against the production of documents which are obtained with a view to impending litigation. . . . . The general rule is not confined to cases where litigation has actually been commenced or to communications between the party and his legal advisers." Montague Smith, J. said:—"The question is whether the limitation to the right to have discovery and production of documents on the ground that they were obtained with a view to litigation or impending litigation applies to the reports in question: and I think the reports are within the limitation, and that we ought not to order the production of them: the principle of the limitation will be found in the judgments of all the Judges of this Court who took part in the decision of *Woolley* v. *North London Railway Company*; and, to avoid a change of words, I refer to what I said in that case. I said as to the documents which the Court there held ought to have been produced, *viz.* reports made by certain officers of the company in the ordinary course of their duty—'I think we may fairly infer that these reports would be made, whether there was any cause of action or not;' and I then stated that I understood the limitation to the right to be that, if the documents are procured for the purpose of assisting the party in an impending litigation, and to obtain advice, they are not to be produced; and I then referred to *Reid* v. *Langlois*[1] and *Steele* v. *Stewart*,[2] which show that, if the information is obtained not by, though for, the attorney of the party, it is privileged from production. To these two cases in Chancery I may now add the recent case of *Ross* v. *Gibbs*.[3] In that case, Stuart, V. C. says:—"The privilege which exempts a 'communication from production is the privilege of the client and not 'of the solicitor; and communications relating to the subject-matter of 'the suit, and furnished with a view to litigation, are as much protected 'upon principle when made by a lay agent to a litigant, as they are 'when made by a solicitor. I account for the frequent reference to the 'solicitor in the authorities to his being treated as the person who 'conducts the litigation; but in reality it is the plaintiff who conducts 'the litigation, though he conducts it through his solicitor.' The Vice-

[1] 1 McN. & G. 627.
[2] 1 Phil. 471.
[3] L. R. 8 Eq. 522, 524; 39 L. J. (Ch.) at p. 63.

Chancellor, in this passage, places the principle of the privilege on broad, intelligible, and, I apprehend, sound grounds: and I confess I think this limitation to the general right to require production ought in its application to be liberally construed in favour of the limitation. Now the documents in question seem to me clearly to fall within the limitation. They are the reports of a medical man sent by the defendants to examine the plaintiffs, not only after the cause of action had arisen, but after a claim had in effect been made, and when the defendants were in immediate peril of an action and for the sole object of reporting his opinion on the subject-matter of the claim for the guidance of the defendants and their legal advisers. I confess I can draw no other inference than that this report was obtained with a view to impending litigation, and for the purpose of assisting the defendants and their advisers in dealing with it; and, that being so, I think we ought not to order the production. We were pressed with the decision of the Court of Queen's Bench in *Baker* v. *London and South-Western Railway Company*.[1] I should be sorry to decide in opposition to the judgment of a co-ordinate Court, but the circumstances of that case differ from those of the present. There, two persons, a medical man and an attorney's clerk, were sent to negotiate a settlement of the claim, which settlement was afterwards impeached. It was not contended in that case, in opposition to the production of the documents, that they were obtained with a view to impending litigation; but the case was argued on other grounds. It is not necessary to say how far the ground of decision in that case ought to prevail: but it seems to me that it does not govern the present case, where the object of the examination was such as I have before pointed out. It may be observed that plaintiffs need not consent to such a medical examination as took place in this case, if they do not think it expedient, and may impose terms on their assent, as, that they shall be permitted to see the report and opinion of the medical man. But if without any terms the examination is made, as in this case, with a view to advice or evidence in litigation, it seems to me that the protection from discovery is not displaced by the mere fact that the plaintiff consents to be examined."

In *Skinner* v. *The Great Northern Railway Company* (L. R. 9 Ex. 298), inspection was claimed of two reports made to the defendants by their medical officer upon examining plaintiff after a claim for compensation had been made and in consequence of that claim, but before any action had been commenced or any communication made by the plaintiff's attorney. It was contended that, under the rule laid down

[1] L. R. 8 Q. B. 91.

in *Fenner* v. *London and South-Eastern Railway Company*,—*viz.* that a document is not privileged unless it is in the nature of instructions for a brief, inspection of these reports ought to be allowed. Bramwell, B. said:—"We have to choose between the decision of the Queen's Bench[1] and that of the Common Pleas,[2] and we follow the latter,[2] which is in conformity with the practice of this Court." Pigott, Cleasby, and Amphlett, B. B. B. concurred.

In *Malden* v. *Great Northern Railway Company*[3] the plaintiff, in an action for personal injuries sustained on the defendants' line, was attended by Mr. S, at whose suggestion Mr. J, the medical officer of the company, was called in. Mr. J, having met Mr. S in consultation on three occasions, made reports to the company on the 20th November and 5th December. At the company's request, Mr. E examined the plaintiff in conjunction with Mr. J and Mr. S, and sent a short report to the company on the 5th January, signed by all three. On the 6th January, Mr. E made a further and more detailed report signed by himself alone. At this time no claim had been formally made, but it was understood that the company were responsible to the plaintiff. On the 10th April another consultation was held between Messrs. S, J, and E, and a report was sent the same day to the company by Mr. J. It was held that the reports of the 20th November, 5th December, and 5th January were not privileged, and that plaintiff was entitled to see them. The report of the 6th January was waived, and that of the 10th April, after being inspected by the Court, was held to be privileged. Blackburn, J. said:—"We adhere to the principles we laid down in the case of *Fenner* v. *London and South-Eastern Railway Company*;[1] the difficulty is in the application of those principles. . . . . Now we are agreed upon this, that, if a medical man is sent down to examine a patient and to report to a company, and it is done with such a warning to the patient's friends, who are acting for him in the matter, or to his attorney, if he has one—if it is done under such circumstances that there is a contract actually made that the doctors are to come and see the man, and have a fair examination and report to the company, and that report is to be for their guidance, and is confidential—then, undoubtedly, we should not order them to produce it: and where the circumstances are such, from the plaintiff's attorney being concerned in it, that it may be implied, although not expressly said, that such an agreement was understood, I should say the same thing. The difficulty of implying an understanding is considerable, unless

[1] *i.e. Fenner* v. *London and South-Eastern Railway Company*, *ante*, p. 563.

[2] *i.e Cossey* v. *London, Brighton, and South Coast Railway Company*, *ante*, p. 567.

[3] Before the Queen's Bench, though reported at L. R. 9 Ex. 300.

there is an attorney concerned in the matter, who would know what was the usual practice; and, if the company choose to let it rest on an understanding and implication, they must run the risk of having litigation to see whether it is implied or understood."

In *Anderson* v. *The Bank of British Columbia* (L. R. 2 Chan. Div. 644; S. C. 35 L. T. Rep. N. S. 75), the manager of the London establishment, observing litigation imminent, telegraphed to the manager at Oregon, North America, to send by letter the fullest particulars of the whole transaction. In answer to this telegram the English manager received a letter for which the defendants claimed privilege, on the ground that it was a communication in reference to the subject-matter of the litigation, made by a third person to enable the defendants to prepare their defence to the litigation then in anticipation. The Master of the Rolls held that the letter was not a privileged communication, and ordered it to be produced; and this order was confirmed by the Court of Appeal. James, L. J. said that reference had been made to the cases at law in which, as it was stated, a different rule had been adopted. But those cases were to be looked at with regard to their special circumstances, and they all seemed to be based upon this principle, that you had no right to see your adversary's brief, and no right to see the materials for his brief. As between principal and agent, it was the duty of the agent in the ordinary course of his business to give his principal the fullest information without reference to litigation. If, even after the bill was filed, the defendants had telegraphed for information, the Court would have told the defendants that it was their duty to get all the information they could, and, when got, to discover what it was. The knowledge of the agent was the knowledge of the principal, and upon these grounds the order of the Master of the Rolls would be affirmed and production by defendants of the letter in question ordered. Mellish, L. J. said that the question to be decided was, whether a letter from the agent abroad stating what he had done for his principal in a particular transaction, was privileged because the information was given to the principal after the threat of litigation in respect of the transaction. He was clearly of opinion that such information was not privileged, as it related to matters which the agent had done for or on behalf of the principal, which were really the acts of the principal himself. If a party to litigation was entitled to obtain discovery from the principal by interrogatories and by an order for the production of all documents in his possession, he must equally be entitled to get discovery from the agent of information sent by him to his principal. If such information were allowed to be privileged, a principal when interrogated as to particular business which had been transacted in his office might shelter himself

by saying, 'I don't know it of my own knowledge. All I know is 'derived from what my clerks told me, and as what they told me was 'told after litigation had been threatened, their communications are 'privileged.' The result would be to deprive parties of all benefit of the discovery to which they were entitled. Moreover, if both parties, whether plaintiffs or defendants, were bound to discover whatever information they had received from their agents, the course of litigation would be much facilitated and the trouble and expense of sending out a commission—in this case to Oregon—to examine the books and get at the information on the spot, would be saved.

In *Pacy and wife* v. *The London Tramway Company* (not reported, before Queen's Bench Division on 22nd March, 1876) the plaintiffs sued for an injury to the wife caused by an accident on the tramway; they brought their action in the Exchequer Division and applied at Chambers for an order to inspect a report of a surgeon, who had seen the injured party. This was refused in accordance with the Exchequer decisions on the subject, and notwithstanding the opposite rule followed by the Queen's Bench and Common Pleas Divisions. The plaintiffs appealed against the order of refusal, which was, however, confirmed, Cockburn, C. J. saying that, in an Exchequer cause, they were bound to follow the decision of the Judges of the Exchequer Division.[1]

The conflict of decision between the Divisions of the High Court of Justice terminated, however, with the case of *Bustros* v. *White* (L. R. 1 Q. B. Div. 423; S. C. 34 L. T. Rep. N. S. 835) which finally decided that a Judge has no discretionary power to refuse discovery except on the ground of privilege, and which is also an important authority as to what documents are privileged. The plaintiff in this case was the consignee of a cargo of seed shipped at Alexandria and discharged at Newcastle. He complained that the seed had arrived in bad condition; and he sued the owner of the ship in which it was carried for causing the damage by neglect of proper care in packing. The ship-owner alleged that such damage arose from the seed being

[1] See also *Friend* v. *The London, Chatham, and Dover Railway Company* (36 L. T. Rep. N. S. 729), decided after *Bustros* v. *White*. Here the plaintiff commenced an action against a railway company to recover damages for injuries sustained whilst travelling on their line. With the plaintiff's consent the company's doctor saw and examined the plaintiff, and made a written report to the company's solicitor. On the plaintiff claiming inspection of the report, the defendants' solicitor made an affidavit (which the plaintiff did not answer) that *the doctor was sent, and his reports procured by the solicitor* to be used as evidence for the defendants at the trial. Held by the Court of Appeal (affirming the decision of the Exchequer Division, Pollock and Huddleston, BB.), that the report was privileged, and the plaintiff not entitled to inspect it.

shipped in a bad state. The plaintiff had had some correspondence with his agent at Newcastle, and also with a house at Alexandria, on the subject of the cargo, and the defendant desired that this correspondence should be produced, making the usual affidavit for the purpose, that he believed it would be "material for his defence to the action," according to the terms of the rule under the Judicature Act, substantially in accordance with the enactment in the Common Law Procedure Act of 1854. A Judge at Chambers, looking at the letters and thinking that they did not so much contain facts as opinions, declined to make the order for production; and this was confirmed in the Queen's Bench Division. The defendant, who desired the production of the letters, appealed, and the question was argued before a full Court of eight Judges. The Master of the Rolls proceeded to deliver their unanimous judgment, that the correspondence must be produced. The Judicature Act, they said, only re-enacted the provision of the Common Law Procedure Act, which was absolute in its terms, and did not preclude a party from resorting to a Court of Equity for discovery in any case in which the production of the documents was not protected as professionally privileged, which they considered was not the case here. Rule 12 of Order XXXI is a reproduction in a slightly altered form of section 50 of the Common Law Procedure Act, 1854 (see *ante*, p. 555), under which it was held that the Judges had a discretionary power to refuse discovery in cases other than those of privilege. Rule 11 of the same Order reproduces section 18 of the Chancery Amendment Act, 1852 (15 & 16 Vict. Cap. 86); which empowered the Court to make an order for the production by any defendant upon oath of such of the documents in his possession or power relating to the matters in question in the suit as the Court thought right. Under this section it was thought that the Court had no discretionary power, and that, if the documents were material to the plaintiff's case, and could not be brought within the rules as to privilege, they must be produced *ex debito justitiæ*. The question then was whether the Common Law practice of *discretion*, or the Chancery practice of *no discretion*, was to prevail: and the Judges held that they were bound by the directions contained in section 25, sub-section 11, of the Judicature Act, 1873, which enacts that in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail. It was true that some part of the correspondence took place after the action was commenced; but it did not come within the rule of privilege applying to professional confidence, which *only applied to inquiries*

instituted by or under the direction of professional advisers: nor was it enough to object that the correspondence might, perhaps, be injurious to the other party at the trial before a jury, or that it contained rather expressions of opinion than statements of facts. On this point it was said:—"There is nothing that brings the matter of opinion within the rules as to professional or *quasi*-professional privilege; and by *quasi*-professional privilege I understand this to be meant—that the advice or communication may be protected when it does not proceed from the solicitor directly, but is information sent at his instance by an agent employed by him, or even by the client on his recommendation." In concluding their judgment, the Court thought it right to make some observations upon the practice, which they had found to prevail at Chambers, of the Judge looking at the papers, production of which was desired. Without saying whether this practice was improper, the Court thought it right to say that, if the papers were thus produced to the Judge, the party could not be permitted to appeal against the order.

The case of *Bustros* v. *White* is now regarded as the leading case upon the subject of discovery under the new practice in the Supreme Court of Judicature in England;[1] and its spirit will, doubtless, be followed in India in putting a construction upon the new sections of the Code of Civil Procedure. The word 'may' is no doubt used in these sections,

[1] See also following cases:—*Minet* v. *Morgan*, 28 L. T. Rep. N. S. 573: *Mostyn* v. *The West Mostyn Coal and Iron Company*, 34 L. T. Rep. N. S. 531: *Johnson* v. *Smith*, 35 L. T. Rep. N. S. 741: *Friend* v. *The London, Chatham, and Dover Railway Company*, L. R. 2 Excheq. 437; S. C. 36 L. T. Rep. N. S. 729: *Martin* v. *Butchard*, 36 L. T. Rep. N. S. 732: and *Southwark and Vauxhall Water Company* v. *Quick*, 38 L. T. Rep. S. N. 28. The last four of these cases were decided after *Bustros* v. *White*. In *Southwark and Vauxhall Water Company* v. *Quick*, which was affirmed by the Court of Appeal, the documents of which inspection was sought were: (1) transcript of shorthand notes of a conversation between a chimney-sweep employed by the company and their engineer; (2) transcript of notes of conversation between the chairman and the engineer of the company; and (3) statement of facts drawn up by the chairman. All these documents had been prepared with the object of laying them before the solicitor of the company, but it so happened that the memorandum which resulted from the conversation with the chimney-sweep had not in fact been so laid before him. It was held that all these documents were privileged. Cockburn, C. J. remarked that none of the previous decisions was precisely in point, that these documents were all framed with the object of obtaining the opinions of the solicitor upon them, and that he did not see that any distinction could be drawn between documents prepared at the instance of the solicitor and documents drawn up for him by his clients spontaneously. Where an action by A against B gave rise to an action over by B against C, the correspondence between the solicitors of A and B was held privileged from inspection by C (*Bullock* v. *Corrie*, 38 L. T. Rep. N. S. 102).

but, "where a Statute directs the doing of a thing for the sake of justice," says Dwarris, "the word *may* means the same as the word *shall*." And again it has been said, that "when a Statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application; that the word *may* is not used to give a discretion, but to confer a power upon the Court and Judges; and the exercise of such power depends not upon the discretion of the Court or the Judge, but upon the proof of the particular case out of which such power arises."[1]]

Production of witness' title-deeds.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of documents which another person, having possession, would be entitled to refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

[These two sections may be considered together, section 131 extending to the agent the same protection which section 130 creates for the principal. It will be evident from the words "*No witness who is not a party to a suit*," that the privilege created by section 130 extends only to *witnesses who are not parties to the suit in which they are called;* and all such persons are absolutely privileged from being compelled to produce their title-deeds, &c. unless

Privilege belongs only to witnesses other than parties.

[1] *MacDougall* v. *Paterson*, 11 C. B. 755: but see *Jones* v. *Harrison*, 6 Excheq. 328; S. C. 2 L. M. and P. 257: *Latham* v. *Spedding*, 20 L. J. N. S. Q. B. 302: and *Delhi and London Bank* v. *Orchard*, L. R. 4 I. A. 135.

there be a written agreement for their production between them and the person seeking such production. The principle so enacted is in accordance with the rule of English law. "Upon principles of reason and equity," says Mr. Taylor, "Judges will refuse to compel a witness to produce either his title-deeds, or any document the production of which may tend to criminate him, or any document which he holds as mortgagee or pledgee" (§ 428). The fact that the production of a document will expose the person producing it to a *civil action* affords no ground for protection in England according to the decided cases:[1] and the same rule has evidently been adopted by the framers of the Indian Evidence Act, seeing that the above section does not extend the principle of protection to such cases.

Can witness be compelled to give parol evidence of contents?

In England the same rule, which protects title-deeds from production, protects also the party justified in refusing to produce them from being compelled to disclose their contents. "It would be perfectly illusory," said Mr. Baron Alderson,[2] "for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a round-about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate." The same reasoning and the same rule will, no doubt, be followed in India. Where a barrister, pleader, attorney, or vakil is the person in possession of the document, he is expressly prohibited by section 126, *ante*, from stating the contents. As to the owner of the document and other agents, the Act contains no express provision; but, as section 65, clause (*a*) paragraph 4, admits secondary evidence of the existence, condition or contents of a document, only when *a person legally bound to produce* it refuses after notice to do so, it may appear that neither the owner nor any one else can be called to give secondary evidence of a document which the person in possession of it is not legally bound to produce.[3]

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[1] *Doe* v. *Date*, 3 Adolphus and Ellis' Rep. 609; *Doe* v. *Lord Egremont*, 2 Moody and Robinson's Rep. 386.

[2] In *Davies* v. *Waters*, 9 Meeson and Welsby's Rep. 612; see also *Few* v. *Guppy*, 13 Beav. 454.

[3] If this be so, it is contrary to the rule of English law, which admits secondary evidence of a document in the hands of a stranger, who is not compellable by law to produce it, and who refuses to do so—Taylor, § 427.

Section 131 extends not only to professional men, but to trustees, mortgagees, and agents. Having regard to the word 'compelled,' it would appear that these persons will be *allowed* to produce documents, which other persons would be entitled to refuse to produce if such were in their possession. This is in accordance with English law. It would seem to follow that, although a barrister, pleader, attorney, or vakil is forbidden[1] (by section 126) to state the contents of any document with which he has become acquainted in the course and for the purpose of his professional employment, he will be permitted to produce the document itself, if it happen to be in his possession and he choose to do so.

Agents not prohibited from producing.

See, in connection with this section, section 162, and the second proviso to section 165, *post.*

With respect to *witnesses who are parties to the suit*, section 22 of the repealed Act, II of 1855, enacted that "a witness being a party to the suit shall not be bound to produce any document in his possession or power, *which is not relevant or material to the case of the party requiring its production.*" This provision, though not expressly re-enacted, is, however, in entire conformity with the requirements of the whole Evidence Act. A case must be tried and decided *secundum allegata et probata*, and if a plaintiff endeavour to force a defendant to produce a document or title-deed not *relevant or material* to the case, the defendant would properly resist the production on the ground of *irrelevancy*. If this principle be followed, a plaintiff, who must succeed on the strength of his own title, not on the weakness of the defendant's, will be prevented from using the law to detect flaws in the title of the latter. Where the defendant is in possession of a document or title-deed material or relevant to the case of the plaintiff, there can be no doubt that there is no protection, and that production will be compelled.]

Can witnesses being parties be compelled to produce their title-deeds?

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate

Witness not excused from answering on ground that answer will criminate.

[1] See *Hibberd* v. *Knight*, 2 Welsby, Hurlestone, and Gordon's Rep. 11.

such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind :

Proviso.

Provided that no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Rule of English law different.

[The provisions of this section are not in accordance with English law, under which a witness is excused from replying to any question, the answer to which would have a tendency to expose such witness or the husband or wife of such witness to any kind of criminal charge or to a penalty or forfeiture of any nature whatsoever—a rule which was respected even by Chief Justice Jefferies when it told *against* the prisoner. In Ireland, it has even been decided that, upon a trial for the murder of a person killed in a duel, any person who was present and in any way countenanced the proceeding, might refuse to answer any question relating thereto. Under the New York Civil Code, the protection has been restricted to those questions the answers to which would have a tendency to subject to the punishment of *felony*. In England the Legislature has occasionally found it necessary to take away the privilege, or by an act of indemnity to leave no cause for its exercise. The Act relating to combinations by workmen,[1] the Larceny Act, 1861,[2] and the Acts for enquiring into corrupt practices at elections, are examples (and see section 37 of the Madras Police Act, VIII (M. C.) of 1867, which indemnifies witnesses on prosecutions for gaming). But these Statutes differ from the Indian enactment in this, that, under their provisions, the having given evidence is a complete bar to a subsequent prosecution: while the Indian Act does not forbid such a subsequent prosecution, but merely provides that the witness's answer is not to be the means of subjecting him thereto, and cannot be used against him thereupon. It is clear that it might, however, attract suspicion where none attached before, and so lead to the discovery of *other* evidence sufficient to lead to a conviction. Against this, however, may be put the fact that if a witness in England do answer such questions, his replies can be used against him, unless at the time, having claimed the protection of the Court, he was illegally compelled to answer.

[1] 6 Geo. IV, Cap. 129, Section 6.

[2] 24 & 25 Vict. Cap. 96, Sections 75—84.

Whether a witness can be compelled to answer a question, the reply to which would *subject him to a civil action or pecuniary loss, or charge him with a debt*, is a question on which the above section is silent.[1] It was discussed in England in Lord Melville's case[2] and decided in the affirmative by a majority consisting of eight out of twelve Judges. To remove all doubts, however, a Statute was subsequently passed (46 Geo. III, Cap. 37) which declared a witness bound to answer such questions if *relevant to the matter in issue.* The New York Civil Code contains a similar provision. In India there can be no reasonable doubt that the principle should be followed; for, if a man is not protected from answering questions which may subject him to a criminal prosecution, much less should he be protected where the possible consequences of answering are much less serious.

Question must be relevant.

It will be observed that the witness will be compelled to answer only when the question relates to "*matter relevant to the matter in issue.*" This accords in some respect with a suggestion made in England,[3] and mentioned by Mr. Taylor, that, where the question is material to the issue, it should be left to the discretion of the Judge whether or not he will enforce an answer, having due regard to the general interests of justice: provided always that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates; or, at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness. The Indian Evidence Act, although it gives the Judge no discretion as to the answer being compulsory where the matter is material, confers such a discretion upon him when the question is put in cross-examination and relates to a matter not relevant except as affecting the credit of the witness (see section 148, *post*). In the former case, where the answer is compulsory, it enacts that such answer shall not subject the witness to any arrest or prosecution, or be proved against him in any criminal proceeding, *except a prosecution for giving false evidence by such answer.* The latter words create a very proper exception, and are more accurate than the language of the old section 32 of Act II of 1855, "except for the purpose of punishing such person for wilfully giving false evidence *upon such examination.*"

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[1] The above section (132) is almost verbatim the same as section 32 of the repealed Act, II of 1855, which also was silent on this point.

[2] 6 Parliamentary Debates, 167—245.

[3] Law Review, No. XIII, pp. 28—30.

It is not a rule of law but of practice only, that a jury should not convict on the unsupported testimony of an accomplice. Therefore if a jury choose to act on such evidence only the conviction can't be quashed as bad in law. The better practice is for the Judge to advise the jury to acquit, unless the testimony of the accomplice be corroborated not only as to the circumstances of the offence but also as to the participation of the accused in the transaction; & when several parties are charged that it is not sufficient that the accomplice should be confd as to one or more of the prisoners to justify a conviction with respect to whom there is no such confirmation.

The Queen v. Stubbs L.R (1856) N.S. 25 Mayk Cases 16 (Cr. Ca. R.)

It has been held in England that a Judge is not bound to warn a witness of his privilege to refuse to answer criminating questions; nor will counsel be permitted to object to such questions, if the witness himself do not refuse to answer. In dealing with native witnesses in India, it will occasionally be useful to make them understand that their answers cannot be used against them except on a charge of giving false evidence. Where the usual inducements to speak the truth are weak, the addition of any apprehension as to the consequences of speaking it further tends to falsehood, which may be prevented by removing the cause of such apprehension.

It may be observed that witnesess examined by Police officers investigating cases, which they are by law empowered to investigate, are not bound to answer criminating questions put by such officers (see sections 118, 119, and 134 of the Code of Criminal Procedure, Act X of 1872). Collectors engaged in settlement operations and other proceedings are, by clause 1, section 19 of Regulation VII of 1822, authorized to summon all *sadr malguzárs* and other persons owning, occupying, managing, or cultivating lands within or in the vicinity of the *mahal* to which their inquiries extend, and to require the production of their accounts and to examine such persons as to the truth of such accounts; provided, however, that no person shall be compelled to answer any interrogation regarding matters wherein he may have an immediate personal interest in concealing the truth, or in uttering what is false, not being an interest arising out of fear, favor, or reward, or any corrupt bargain or agreement with another party. These provisions are still in force, and are saved by section 2, *ante*. As to *criminating documents*, see section 130, *ante*.]

Two exceptions.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. 24 W. R. Cr. 55-6.

Accomplice.

[Mr. Taylor, speaking of *accomplices*, "who are usually interested and always infamous witnesses, and whose testimony is admitted from necessity,[1] it being often impossible, without having recourse to

State of English law as to accomplices.

[1] It may, however, be observed that the objections which may be made against the reliability of the testimony of accomplices do not apply with similar force to all accomplices. Mr. Taylor, in a subsequent paragraph, says: "One class of persons, *apparently accomplices*, may here be named, to whom the rule requiring

such evidence, to bring the principal offenders to justice," thus explains the law on this subject:—"The *degree* of credit, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. *But no positive rule of law exists on the subject;* and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that Judges, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review, its omission will, in most cases, be deemed a neglect of duty on the part of the Judge. Considering, too, the respect which is always paid by the jury to such advice from the Bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the uncorroborated testimony of an accomplice. The Judges do not in such cases withdraw the case from the jury by positive directions to acquit, but they only advise them not to give credit to the testimony." Mr. Roscoe says:[1] "The law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a Judge would be wrong who did not advise the jury not to convict; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a Judge who did not so advise them was right."

Law in India.

The law on this point in India was fully discussed by the Calcutta High Court in the Full Bench Case of *The Queen* v. *Elahi Baksh* (B. L. R. Sup. Vol.

corroborative evidence does not apply, namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprize, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. *The early disclosure is considered as binding the party to his duty;* and, though a great degree of disfavor may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as that of an accomplice"— (§ 891.) See also *McQueen* v. *Ramsadai Chakravartti* (20 W. R. Cr. Rul. 19), where the witness had been already tried and convicted for the offence as to which she was called to give evidence.

[1] Digest of the Law of Evidence in Criminal Cases.

F. B. 459; S. C. 5 W. R. Crim. Rul. 80) *Peacock, C. J. (Kemp and Phear, JJ. concurring)* said:—"I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle. The point was decided in England as far back as the 10th December, 1662, after conference with all the Judges." After an able review of the English cases, the learned Chief Justice proceeds:—"The law of England, therefore, upon this subject is beyond doubt. The law of America is the same, and in that country, where, in most of the States, new trials are granted in criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice. The cases upon the subject are collected in Wharton's Criminal Law of the United States of America, p. 366. It does not appear that in the cases in which new trials were refused, the Judge who tried the case had omitted to make such observations to the jury, with reference to the evidence of the accomplices, as the circumstances required. But in civil cases it is clear that both in that country and in England a new trial will be granted where, from the absence of proper instructions from the Judge, the jury fall into error . . . . It was contended in the course of argument in the present case, that in India the rule of evidence in the Mufassil is different from the law of England, with respect to the legality of convicting upon the uncorroborated evidence of an accomplice. If there had been a long uniform course of decisions in the late Sadr Court, that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of a prisoner, we should have been disposed to bow to those decisions and to act upon the rule '*Stare decisis.*'[1] One case only was cited in which a Judge of the Sadr Court stated that he did not think it legal to convict upon such evidence. There may be other cases to the same effect. But there is no uniform current of decisions which would justify us in holding that the law in this respect in the Mufassil was different from the established law of England, and from that which was administered in the late Supreme Court and is now administered by this Court in the exercise of original criminal jurisdiction. It would require a uniform train of decisions to justify us in holding that the law of evidence to be administered by the Court upon such a point as this, is different in the exercise of the appellate criminal jurisdiction from that which is acted upon in the exercise of original jurisdiction. When called upon to give effect to particular expressions, which have been used by the Judges of the late Sadr Court with regard to the rules of evidence, we

7, Nizamat Reports, p. 67.

[1] "To abide by the decided cases."

must bear in mind, that, up to a very recent period, when trial by jury was established in certain districts, it was the province of the Sessions Judges and of the Judges of the late Sadr Court to determine questions of fact, as well as questions of law, in criminal cases; and that, in dealing with such cases, it was not very frequently necessary to determine whether the evidence of a particular witness was insufficient in law to justify a conviction or merely insufficient to induce them, as Judges of fact, to declare that a prisoner was guilty. *There is a wide distinction, however, between disbelieving evidence and determining that it is not legally sufficient if believed:* but this distinction is not always sufficiently adverted to by Courts, which are Judges of fact as well as of law."

The Chief Justice then proceeded to consider the question, whether the omission of the Judge to advise the jury as to the amount of credit which ought to be given to the testimony of an accomplice, was such an error in law as to furnish a valid ground of appeal. After a learned review of the authorities in English and Scotch law, he continues:—"It is quite as necessary here as it is in England, if not more so, that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. The question is, whether the omission of the presiding Judge on a trial in the Mufassil to make such observations is not such an error in his summing up as to justify the Court on appeal or revision in setting aside a verdict of guilty. . . . . .

. By section 379[1] of the Code of Criminal Procedure it is enacted that, in a trial by jury, the Judge shall sum up the evidence on both sides, and the jury shall then deliver their finding upon the charge, and 'a statement of the Judge's direction to the jury shall form part of the record.' There can be no doubt that *that* section requires the Judge to sum up properly, and that there would be very great danger in holding that there is no remedy by appeal against a verdict of 'guilty,' if it appears clearly to the High Court *that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses.* It appears to me that it amounts to an error of law in the summing up, which on appeal is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in sections 439 and

[1] *i. e.*, of the *old* Code, Act XXV of 1861. The provisions of the present Code of Criminal Procedure are similar.

426,[1] *viz.*, that the Appellate Court is satisfied that the accused person has been "*prejudiced* by the error or defect, and that a failure of justice has been occasioned thereby."

The whole of this judgment is well worthy of careful study. The state of the law as settled thereby was as follows:—A conviction upon the uncorroborated evidence of one accomplice or more than one is valid in law; but the Judge in summing up should advise the jury as to the danger of convicting a prisoner on such evidence merely. If he omit to do so, and if moreover the Appellate Court is satisfied that the prisoner was prejudiced by such omission, there will be error in law, on account of which the verdict will be set aside. It would appear that the Evidence Act has not altered the law as settled by the above case. Reading together section 114 and Illustration (*b*) thereto, the Court may consider, though it is not bound to consider, an accomplice unworthy of credit, unless he is corroborated in material particulars. Having regard to the definition of the word 'Court' in section 3 of the Evidence Act, to the definition of 'Criminal Court' in section 4 of the Code of Criminal Procedure, and to the use of the word 'Court' throughout Chapter XIX of the same Code, it is clear that 'Court' does not include the jury. The result appears to be that it is discretionary with a Judge to presume or not to presume an uncorroborated accomplice unworthy of credit in any particular case. If he do not think proper to raise this presumption, and the circumstances are such that he exercises a sound judicial discretion in not raising it, he is not bound to suggest it to the jury, and the *conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice.* If, however, the circumstances of the case are such, that he ought, in the exercise of a sound judicial discretion, to have raised the presumption and suggested it to the jury, then his omission to do so will be held to have prejudiced the accused—see *The Queen* v. *Sadhú Mandal* (21 W. R. Cr. Rul. 69) and *The Queen* v. *Chando Chadalini* (24 W. R. Cr. Rul. 55).

Does the Indian Evidence Act alter the law?

The second portion of Illustration (*b*) to section 114 is in accordance with the language of Peacock, C. J. in the case of *The Queen* v. *Elahi Baksh*:—"If two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in

[1] *i. e.* of the *old* Code, Act XXV of 1861. The provisions of the present Code of Criminal Procedure are similar.

corroboration of his evidence under Act II of 1855, section 31.[1] The evidence of the several accomplices so corroborated might be sufficient to satisfy a jury, although the evidence of any one of them alone could not have been safely acted upon." As to what constitutes corroboration, see also *The Queen* v. *Dwarka*, 5 W. R. Crim. Rul. 18 (the corroboration must be on matters directly connecting the prisoner with the offence, and the evidence of two or more accomplices requires confirmation equally with the testimony of one): *The Queen* v. *Chatterdhari Singh and others*, *id.* 60 ("very unsafe to convict without some corroborative evidence connecting the particular person accused with the transaction"): *The Queen* v. *Nawab Jan and others*, 8 W. R. Crim. Rul. 19: *The Queen* v. *Khotab Sheikh and others*, 6 W. R. Crim. Rul. 17: *The Queen* v. *Shamshere Beg*, 9 W. R. Crim. Rul. 51: *The Queen* v. *Mohima Chandra Das and others*, 6 B. L. R. Appen. 108: *The Queen* v. *Mohesh Biswas*, *&c.* 10 B. L. R. 456 note; S. C. 19 W. R. Crim. Rul. 16 ("evidence from sources, independent of the approver, should be forthcoming relative to facts which implicate the prisoner in the same way as the story of the approver does"): *The Queen* v. *Ramsa: Reg.* v. *Malapabin Kapana*, *&c.* 11 Bom. H. C. Rep. 196 (neither previous statements of the same accomplice, nor the confession of a co-prisoner, is sufficient corroboration): and *Reg.* v. *Budhu Nanku*, I. L. R. 1 Bom. 465 (confessions of co-prisoners insufficient): In *R.* v. *Wilks* (7 C. & P. 272) Alderson, B. said:—"There is a great difference between confirmations of an accomplice as to the *circumstances* of the felony and those which apply to the individuals charged. The former only show that *the accomplice was present at the commission of the offence*, but the others shew that *the prisoner was connected with it.*" Where on a charge of sheep-stealing evidence was given to show that a quantity of mutton, corresponding with the parts of the stolen sheep, was found in the prisoner's house, this was held sufficient corroboration to be left to the jury (*Reg.* v. *Birkett*, 8 C. & P. 732). In *Reg.* v. *Farlar* (8 C. & P. 106) Lord Abinger said, that, in his opinion, the corroboration ought to consist in some circumstance that *affects the identity of the accused person.*]

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

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[1] See now section 157, *post*.

[The effect of this section will be that the evidence of a single witness will be sufficient for proof of any fact,[1] if the Court or the jury believe him. It may be well to mention the cases in which, under the old rule, something more was required than the uncorroborated evidence of a single witness. The change in the law made by the above section will thus be more clearly understood. Moreover, these cases must still be useful in assisting the judgment to decide upon the weight to be allowed to evidence under peculiar circumstances. And first as to *Treason*—The rule of English Statute Law in regard to treason[2] and misprision of treason is, that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of two lawful witnesses, either both to the same overt act, or one to one, and the other to another, overt act of the same treason, unless the accused shall openly without violence confess the same: and further that, if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another, another, shall not be deemed to be two witnesses to the same treason. "This protective rule," says Mr. Taylor, "which in England has remained in its present state since the days of King William III, and in Ireland was adopted in the year 1821, has been incorporated with some slight variation into the constitution of America, and may be met with in the statutes of most if not all of the States of the Union." Any *collateral* matter, not conducing to the proof of the overt acts of treason may be proved by a single witness, or by any other evidence admissible at Common Law, *e. g.* that the prisoner is a subject of the British Crown. The rule of the Statute Law, which requires two witnesses in a case of treason, does not in England apply to those treasons, which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding of the Queen, where the overt act or acts alleged shall be the assassination of Her Majesty, or any attempt to

Cases in which English law required more than the evidence of a single witness—Treason.

[1] A conviction upon the statement of a complainant alone is lawful (*Kalam Mandal* v. *Bhawani Prosad*, &c. 22 W. R. Crim. Rul. 32).

[2] Section 28 of the repealed Act, II of 1855, recognized the English law on the above subject. It was as follows:—"Except in cases of treason, the *direct* evidence of one witness, *who is entitled to full credit*, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice, or of a single witness in the case of perjury."

injure in any manner whatsoever her royal person; or to the misprisions of any such treason; but in all these cases the accused shall be indicted, arraigned, tried, and attainted, in the same manner and according to the same course and order of trial, and upon the like evidence as if he stood charged with murder (see 39 & 40 Geo. III, Cap. 93;—1 & 2 Geo. IV, Cap. 24;—5 & 6 Vict. Cap. 51). The offence of '*Treason*' is unknown in the phraseology of Indian law. Offences somewhat analogous are provided for by Chapter VI of the Indian Penal Code, as amended by Act XXVII of 1860.

Perjury.

In cases of *Perjury*, two witnesses were formerly held necessary in England. But this rule is not now law, though something more than the evidence of a single opposing witness is required; for otherwise there would be only oath against oath and nothing to turn the scale. The single witness must be corroborated by material and independent circumstances. "But," says Mr. Taylor, "it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose. Thus a letter written by a defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still evidence, confirmatory of the single accusing witness in some slight particulars only, will not be sufficient to warrant a conviction: but it must at least be strongly corroborative of his testimony: or, to use the quaint but energetic language of Chief Justice Parker, 'a strong and clear evidence and more numerous than the evidence given for the defendant.'" Without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may be sufficient for conviction without further proof. This rule of English law has been followed in India. The most important decision on the subject is that of a Full Bench of the Calcutta High Court in the case of *The Queen* v. *Lal Chand Kaurah Chaukidár and others* (B. L. R. Sup. Vol. F. B. 417; S. C. 5 W. R. Crim. Rul. 23; S. C. 1 Jur. N. S. 83), Peacock, C. J. said:—"According to the law as administered in the exercise of original criminal jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict for perjury because it is governed by the rules of the law of England. I do not mean to say that every rule of the law of evidence as administered in England applies to the Mufassil. But I cannot think that we ought to put such a construction upon section 28, Act II of 1855,[1] as

[1] See *ante*, page 585 note.

would allow a person to be convicted of perjury at Alipore[1] or in other parts of the Mufassil, upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its original criminal jurisdiction. Such a construction would not be very consistent. But if the law is so, we are bound by it. If there was any rule or practice in the Sadr Court or in the Courts in the Mufassil which, before Act II of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in section 28. Now, there is a case which was decided by Mr. Samuells in the Sadr Court (see Nizámat Reports, Vol. IX, p. 212, *Government* v. *Gorib Peada*), in which the rule was laid down as follows:—'Perjury is not to be 'assumed because the story of one man appears more credible than 'that of another. There must be certain proof adduced, independent 'of the oath of one of the parties, that the deposition of the other is 'false.' That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary; that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. The rule, which was laid down by the Sadr Court in this case, is supported by other cases, and is in accordance with the principle of the English law. Indeed, I think, I may safely say that it was the practice of the Sadr Nizámat and of the Mufassil Courts not to allow a conviction for perjury upon the uncorroborated evidence of a single witness: consequently the case does not fall within the general rule of section 28, inasmuch as it is taken out of that rule by the provision, which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in case of perjury." In the case of *The Queen* v. *Bakhori Chaubi* (5 W. R. Crim. Rul. 98), the accused was charged with giving false evidence by denying that he had verified or presented a certain written statement, and it was held that the corroboration, derived from a comparison of signatures, was sufficient to sustain a conviction.

"If the evidence adduced in proof of the crime of perjury consists," says Mr. Taylor, "of *two opposing statements by the prisoner*

[1] A suburb of Calcutta, just outside the local limits of the Original Jurisdiction of the High Court.

and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed from the solemnity of the sanction that the declaration was the truth, and the other an error or falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence *with other circumstances* against him; and, *if both the contradictory statements were delivered under oath*, there is still nothing to show which of them is false, when no other evidence of the falsity is given. If indeed it can be shown that before making the statement upon which perjury is assigned, the accused had been *tampered* with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained; and, provided the nature of the statements was such that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that, because a man has given contradictory accounts of a transaction on two occasions, he has thereby committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time." The latter portion of the above quotation consists of the remarks of *Holroyd, J.* in *R.* v. *Jackson* (1 Lew. C. C. 270), and may well be borne in mind in India where the law on the subject of contradictory statements is not the same as in England. Two Full Benches of the Calcutta High Court have at different times decided that, where no evidence for the prosecution is offered corroborative of either statement, and the giving intentionally of false evidence is charged on two contradictory depositions made, the one before the committing Magistrate and the other before the Sessions Judge, a finding in the alternative is sufficient to maintain a conviction (*The Queen* v *Mussamat Zumiran*, 6. W. R. Cr. Rul. 65: *The Queen* v. *Muhammed Humayan Shah*, 21 W. R. Cr. Rul. 72). In the former case the very learned Chief Justice (Peacock) thus delivered the opinion of the majority of the Court:—"I have no doubt that there may be an alternative finding, as well in a case in which the evidence proves the commission of one of two offences falling within the same section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is

Case of two contradictory statement.

applicable. This appears to me to be quite clear when section 381[1] of the Code of Criminal Procedure is read together with section 242,[2] and clause 5, section 382 of that Code. A swears before the Magistrate that he saw the prisoner kill B. The prisoner is committed to the Sessions for trial for murder. A on the trial swears that he did *not* see the prisoner kill B, and the prisoner is acquitted: A is in consequence committed for trial for giving false evidence, and two charges are framed against him under section 242,[2] Code of Criminal Procedure:—1*st*, That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill B: 2*nd*, That he intentionally gave false evidence before the Sessions Judge by swearing that he did *not* see the prisoner kill B. The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate or that made before the Sessions Judge was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness in consequence of bribery or other cause has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that unless the law is very defective, or we are to trifle with the administration of justice, A ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit. In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads

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[1] Section 381—"When the trial in any criminal Court is concluded, the Court in passing judgement, if the accused person be convicted, shall distinctly specify the offence of which, and the section of the Indian Penal Code under which, he is convicted; or, if it be doubtful under which of two sections the offence falls, shall distinctly express the same, and pass judgment in the alternative, according to section 72 of the said Code." See the corresponding section (461) of the *present Code*, Act X of 1872.

[2] Section 242—"When it appears to the Magistrate that the facts which can be established in evidence show a case falling within some one of two or more sections of the Indian Penal Code, but it is doubtful which of such sections will be applicable, or show the commission of one of two or more offences falling within the same section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads framed respectively under each of such sections, or charging respectively each of such offences accordingly." See section 455 and the specimen charge of an offence under section 193 of the Penal Code in Part II, Schedule III of Act X of 1872.

under section 242. The Sessions Judge would also be strictly within the letter, as well as the spirit of sections 381 and 382 (clause 5), in finding that A is guilty of the offence of intentionally giving false evidence, and that he is guilty *either* of the offence specified in the first head, *or* of the offence specified in the second head of the charge." The second Full Bench case was decided after the present Code of Criminal Procedure came into operation. See, to the same effect, *The Queen* v. *Palany Chetty*, 4 Mad. H. C. R. 51 ; and *The Queen* v. *Ross*, 6 Mad. H. C. Rep. 342. It may again be remarked here that the study of the Law of Evidence is greatly assisted by a knowledge of the principles of logic. If the "*opposition*" between the two statements or propositions, upon which perjury is assigned, is that known by logicians as *contradiction*, one of them *must* be false ; if they were *contraries*, both *might* be false, but both could not be true ; if they were *sub-contraries*, both statements *might* be true, and a conviction in the alternative *could*, therefore, be wrong. The following cases will supply instances of convictions on alternative charges, some of which have been upheld and others of which have been reversed :—*The Queen* v. *Utur Narain Singh*, 8 W. R. Crim. Rul. 79 : *The Queen* v. *Dinonath Bajar*, 9 W. R. Crim. Rul. 52 : *The Queen* v. *Súnder Mohuri*, 9 W. R. Crim. Rul. 25 : *The Queen* v. *Bedu Noshya*, 12 W. R. Crim. Rul. 11 : *The Queen* v. *Kola*, 12 W. R. Crim. Rul. 66 ; S. C. 4 B. L. R. A. Crim. 4 : *The Queen* v. *Matí Khowa*, 3 B. L. R. A. Crim. 36 ; S. C. 12 W. R. Crim. Rul. 31 : *The Queen* v. *Ganauri*, 22 W. R. Crim. Rul. 2 : and *The Queen* v. *Nomal*, 4 B. L. R. A. Crim. 9. In the last case Mr. Justice Norman said :—"To overlook the difference between the making of contradictory statements by a witness under examination, and the giving of intentional false evidence, is to shut one's eyes to the infirmities of human memory, to fail to understand how slow are the intellects, and how imperfect the powers of expression of uneducated peasants ; how readily the fears of such people are excited in Courts of Justice ; how completely they lose nerve and presence of mind, when frightened. I firmly believe that, if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes, subjected to cross-examination by an adroit and perhaps not over scrupulous advocate, would be safe."

Other Cases.

In *bastardy* cases, it is the rule of English law that, before an order of affiliation can be made, the evidence of the mother must be corroborated in some material particular by other testimony. "This rule has been wisely established," says Mr. Taylor, "in order to protect men from accusations which profligate, designing and interested women might

easily make, and which, however false, it might be extremely difficult to disprove." These remarks may occasionally be well borne in mind by Magistrates disposing of cases under Chapter XLI of the Code of Criminal Procedure. Finally, section 2 of "The Evidence Further Amendment Act, 1869," 32 & 33 Vict. Cap. 68, enacts that "the parties to an *action for breach of promise of marriage* shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Although corroboration is not required in India in any of the above cases, it may be well, when estimating the value of testimony in particular instances, to bear in mind that the Legislature in England has not thought it safe in such cases to accept the testimony of a single witness without such corroboration.

Court must examine all the witnesses offered by the parties.

It is not competent to a Court to refuse to examine any of the witnesses produced by the parties. Where a plaintiff tendered *fifty-eight* witnesses to prove a fact, and the District Court, having taken the depositions of *thirty* of them, refused to permit the examination of the remaining twenty-eight, on the ground that they were called to speak to facts sufficiently deposed to by those already examined, the Judicial Committee of the Privy Council remitted the case to the Sadr Court (who had refused to remedy the error of the District Court), being of opinion that the refusal by that Court to admit the examination of the witnesses tendered was irregular, and that no decision could be arrived at on the merits under such circumstances (*Jeswant Sing-ji Ubby Sing-ji and another* v. *Jet Sing-ji Ubby Sing-ji*, 2 Moo. Ind. Ap. 421). See also *Watson and Co.* v *Naki Mandal*, 6 W. R. Act X Rul. 83: *Rani Ujalla Kumári Dhujamani Debya* v. *Ghulam Mastafa Khan*, 6 W. R. Civ. Rul. 60: *Nilkant Surma and others* v. *Susela Debya and others*, 6 W. R. Civ. Rul. 324: *Rakhal Das Mandal* v. *Protab Chandra Hajra*, 12 W. R. Civ. Rul. 455: *Lálú Singh and another* v. *Rajendra Laha*, 8 W. R. Civ. Rul. 364: *Mussamat Shusímukhí Bramani* v. *Sham Chandra Rai*, Marsh. Rep. 266: and *Ram Dhan Mandal and another* v. *Rajballab Paramanik and others*, 6 B. L. R. Ap. 10. In the last mentioned case it was said:—"It has been repeatedly ruled that, unless the object of a party in summoning a large number of witnesses clearly appears to be to impede the adjudication of the case or otherwise obstruct the ends of justice, it is the bounden duty of the Court to receive all evidence tendered." This seems to imply that a Civil Court has the power to refuse to examine an excessive number of witnesses if satisfied that the object of the party calling them is clearly to impede the adjudication of the case. It may, however, be observed that the

Code of Civil Procedure contains no section analogous to section 359 of the Code of Criminal Procedure, Act X of 1872, which, in cases committed to the Court of Session or High Court, gives a Magistrate a certain discretion in excluding from the list of witnesses to be summoned for the defence before the superior Court the names of persons whose evidence is not really relevant. This section is as follows:—"If the Magistrate thinks that any witness is included in the list *for the purpose of vexation or delay or of defeating the ends of justice*, he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material. If the Magistrate be not so satisfied, he shall not be bound to summon the witness; but in doubtful cases he may summon such witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness." When the Magistrate does not proceed under this section, the accused is entitled to have the witnesses named in the list delivered to the Magistrate examined before the Court of Session (*The Queen* v. *Prosonno Kumar Maitro*, 23 W. R. Cr. Rul. 56). An accused person tried by a Magistrate has a right to have all his witnesses examined (*Srinath Mandal* v. *Sriram Rajpút &c.* 24 W. R. Cr. Rul. 62). In the case of *Ram Sahai Chaudhri* v. *Sanker Bahadur* (6 B. L. R. Appen. 65) the Magistrate had refused to summon certain persons named as witnesses by the accused on the ground that they were implicated in the offence charged. They had not, however, been accused. The High Court quashed the conviction.[1]]

CHAPTER X.—OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court.

[According to the provisions of the Code of Civil Procedure the evidence of the witnesses upon the trial of a civil case is to be taken

[1] The following cases connected with the same subject may also be referred to:—*In the matter of the petition of Mahima Chandra Saha*, 6 B. L. R. Appen. 78: *The Queen* v. *Eshan Dutt and others*, 6 B. L. R. Appen. 88: *The Queen* v. *Bhúban Issur Gosami*, 2 W. R. Crim. Rul. 6: *The Queen* v. *Abdúl Sattar*, 3 W. R. Crim. Rul. 35: *The Queen* v. *Srinath Mukhapadhya and others*, 7 W. R. Crim. Rul. 45: *The Queen* v. *Kali Thakur*, 5 W. R. Crim. Rul. 65.

orally in open Court[1] in the presence and under the personal direction and superintendence of the Judge (section 181). The order in which the witnesses are to be produced and examined at the trial of an original case is regulated by the following sections of the Code:—

"*Section* 179. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

Order of production and examination of witnesses in civil cases.

Explanation.—The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Right to begin.

Section 180. The other party shall then state his case and produce his evidence (if any).

Right to reply.

The party beginning is then entitled to reply.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. In the latter case the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning;

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[1] There are three exceptions to this general rule:—(1) when evidence is taken by commission (see *ante*, p. 180 *et seq*): (2) when the Court *for sufficient reason* orders any fact or facts to be proved by affidavit, in which case the witness may be directed to be produced for cross-examination (see sections 194—197 of the Code of Civil Procedure): (3) when a witness about to leave the jurisdiction of the Court is examined before the trial. Section 192 of the Code enacts that if a witness be about to leave the jurisdiction of the Court, or if other sufficient cause be shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of either party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided. Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient of the day fixed for the examination shall be given to the parties. The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and may then be read at any hearing of the suit. It has been held that evidence under this section must be taken by the Court and cannot be taken by commission unless the parties consent (*Edwards* v. *Muller*, 5 B. L. R. 252.)

but the party beginning will then be entitled to reply generally on the whole case."

Right to begin, and right to reply upon hearing appeals.

The right to begin and the right to reply upon the hearing of a civil appeal are regulated by section 555, which enacts that, "on the day fixed for hearing the appeal, or on any other day to which the hearing may be adjourned, the party having the right to begin shall be heard in support of or against the appeal, as the case may be. The other party shall then be heard, and the party having the right to begin shall then be entitled to reply.[1]

Explanation.—If the appeal is from the whole decree, or if there are cross-appeals, the party having the right to begin is the party who had the right to begin on the hearing in the Court whose decree is appealed from.

If the appeal is from only a portion of the decree, and there is no cross-appeal, the appellant has the right to begin."

According to the provisions of the Code of Criminal Procedure the witnesses upon a criminal trial must be examined in the presence of the accused person or of his agent, where he is permitted to appear by agent—a permission which may be granted in cases before Magistrates but not in cases before the Court of Session.[2] It will not be a sufficient compliance with this requirement of the law to read over to the witnesses, in the presence of the accused, depositions given by them on a former trial or in a previous stage of the same trial when the accused was not present, and inquire if these depositions are correct, requiring the witnesses at the same time to identify the prisoner. No matter how often the same case comes before the Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo*[3] (*The Queen* v. *Kanai Sheikh*, W. R. Jan.—

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[1] The old Code contained no provisions as to the *right to begin* and the *right to reply*; but, nevertheless, where a lower Appellate Court had not heard the appellant's pleader in reply, the High Court directed a new trial of the appeal (*Jardine* v. *Tarini Mohan Sen*, &c. 8 B. L. R. Appen. 44.)

[2] See sections 191 and 214 of the Code of Criminal Procedure. Section 191 relates to *inquiry into cases triable by the Court of Session or High Court:* and section 214 relates to *warrant cases triable by Magistrates.* There is no specific provision applicable to *summons cases*, Chap. XVI; or to *trials before the Court of Session*, Chap. XIX. This latter chapter, however, clearly assumes the accused persons to be present. Section 237 directs him to be brought before the Court when it is ready to commence the trial; and subsequent sections regard him as before the Court throughout the trial.

[3] To the rule which requires the witnesses in criminal cases to be examined in the presence of the accused person there are *three* exceptions:—(1) when witnesses are examined by commission (*ante*, p. 183): (2) when the accused

July, 1864, p. 38: *The Queen* v. *Sheikh Kiyamat*, *id.* p. 1: *The Queen* v. *Afazudin*, *id.* p. 13: *The Queen* v. *Matti Nushya*, *id.* p. 18: *The Queen* v. *Mahan Banfor*, 22 W. R. 38). In a trial before the Court of Session, after the accused has pleaded to the charge, and the jurors or assessors have been chosen, the person conducting the prosecution opens his case and then the witnesses for the prosecution are examined, cross-examined and re-examined (section 247 of the Code of Criminal Procedure). After this the accused person is examined, and then he is asked if he means to call witnesses. If he says that he does not, the prosecutor may sum up his case. If the Court then considers that there are grounds for proceeding, it shall call on the accused person to state his grounds of defence and produce his witnesses. The accused person, or his counsel or authorized agent may then state the case for the defence and may examine the witnesses, if any, produced for the defence, and at the conclusion of such examination may sum up his case (section 251). If any evidence is adduced on behalf of the accused person, the officer conducting the prosecution shall be entitled to reply (section 252). The Code of Criminal Procedure makes no provision for counsel, pleader or other persons addressing the Court in Magistrates' cases or in the course of proceedings preliminary to commitment.

It frequently happens in India that a Judge or Magistrate, who has partly heard a case, is unable to decide it in consequence of being transferred to another district or of some other cause. The Legislature has thought proper to provide for this contingency. Section 191 of the Code of Civil Procedure enacts that where the Judge, taking down any evidence, or causing any memorandum to be made under that chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum as if he himself had taken it down or caused it to be made.[1] Similar

Evidence taken by Judge or Magistrate, who is prevented from deciding the case.

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has absconded and evidence is taken in his absence (*ante*, p. 180): (3) when an appellate Court directs that further enquiry be made or additional evidence taken by the lower Court, and does not think necessary to direct that the appellant be present when such further inquiry is made or such additional evidence taken (see section 282 of the Code of Criminal Procedure).

[1] There were no similar provisions in the former Code, and it was in consequence held that the successor was bound to recall and examine the witnesses *de novo*, unless the parties consented to his proceeding upon the evidence already recorded (*Mussamat Unnapurna* v. *Harballab Singh*, &c. 8 W. R. Civ. Rul. 465: *Naranbhai Vrigbhukandas* v. *Narosh Sakar Chandra Shankar*, &c. 4 Bom. H. C. Rep. 98). See also *Surendro Persad Dobey* v. *Nandan Misser*, &c. (21 W. R.

provisions are found in the Code of Criminal Procedure in respect of Magistrates' cases. Section 328 enacts that, "whenever any Magistrate, after having heard part of the evidence in a case, ceases to exercise jurisdiction in such case, and is succeeded by another Magistrate who has and who exercises jurisdiction in such case, such last-named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh: provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh: provided also that any Court of Appeal or Revision, before which the case may be brought, or in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District, without appeal, may set aside any conviction, passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate is of opinion that the accused person has been materially prejudiced thereby; and may order a new trial."[1] Section 329 enacts that "whenever, from any cause, a Magistrate making an inquiry[2] under Chapter XV of this Act, is unable to complete the proceedings himself, any other Magistrate having jurisdiction to enquire and to commit may complete the case and proceed as if he had recorded all the evidence himself." There is no similar provision as to cases tried by the Court of Session, and the sections of the Code applicable to Sessions trials clearly contemplate the whole trial taking placing before the same Judge. Under the old Code, it was decided that if the Judge, who recorded some of the depositions of the witnesses, were obliged to leave the district before he could conclude the trial, his successor must re-commence *de novo* (*The*

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196) in which a District Judge had *transferred* to his own file a case partly heard by a Subordinate Judge. It was held that the District Judge was bound to examine *de novo* the witnesses whose evidence had been recorded by the Subordinate Judge. The above section of the Code of Civil Procedure has no application to a case of this kind.

[1] There is one other case in which a Magistrate may deal with a case upon evidence not recorded by himself, *viz.* when a Subordinate Magistrate, having jurisdiction, finds an accused person guilty, and considering that a more severe punishment should be inflicted than he is competent to adjudge, submits his proceedings to the Magistrate of the District or to the Magistrate of the Division of a District to whom he is subordinate, and such latter Magistrate proceeds to pass sentence (see section 46 of the Code of Criminal Procedure).

[2] *i. e.*, inquiry preliminary to commitment. It is to be observed that these sections have no application when a case is transferred from one to another Magistrate under section 47 (*The Queen* v. *Khan Mahomed*, &c. 24 W. R. Cr. Rul. 53).

Queen v. *Charru*, W. R. Jan.—July 1864, p. 32): and under the present Code it has been held that a Sessions Judge cannot convict an accused person upon evidence recorded by his predecessor (*The Queen* v. *Gopi Nashyo, &c.* 21 W. R. Cr. Rul. 47: *The Queen* v. *Raghunath Das, &c.* 23 W. R. Cr. Rul. 59).

Witnesses are examined upon oath or affirmation according to the provisions of "The Indian Oaths Act," X of 1873, which here follows:—

An Act to consolidate the law relating to Judicial Oaths, and for other purposes.

Preamble.

WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations, and declarations, and to repeal the law relating to official oaths, affirmations, and declarations; It is hereby enacted as follows:—

I.—Preliminary.

Short title.

1. This Act may be called "The Indian Oaths Act, 1873."

Local extent.

It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty;

Commencement.

And it shall come into force on the first day of May, 1873.

2. *Repealing section.*

Saving of certain oaths and affirmations.

3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of the Indian Councils' Act, 1861, the Governor-General in Council has not power to repeal.

II.—Authority to administer Oaths and Affirmations.

Authority to administer oaths and affirmations.

4. The following Courts and persons are authorized to administer by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:—

(*a.*) All Courts and persons having by law or consent of parties authority to receive evidence;

(*b.*) The Commanding Officer of any military station, occupied by troops in the service of Her Majesty: provided

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or affirmations to be made by—

5. Oaths or affirmations shall be made by the following persons:

witnesses:

(*a.*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence:

interpreters:

(*b.*) interpreters of questions put to, and evidence given by, witnesses, and

jurors.

(*c.*) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Affirmation by Natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and Affirmations.

Forms of oaths and affirmations.

7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

Power of Court to tender certain oaths.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit,

notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Court may ask party or witness whether he will make oath proposed by opposite party.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation :

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Administration of oath if accepted.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Evidence conclusive as against person offering to be bound.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

Procedure in case of refusal to make oath.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in section eight, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

V.—Miscellaneous.

Proceedings and evidence not invalidated by omission of oath or irregularity.

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission,[1] substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

[1] It has been held that the word "omission" in this section includes any omission and is not limited to accidental or negligent omissions (*The Queen* v. *Sewa Bhogta*, 23 W. R. Cr. Rul. 12). See this section applied where the Jury were not sworn in *The Queen* v. *Ramsadai Chakravartti*, 20 W. R. Cr. Rul. 19. See 6 & 7 Vict, C. 22.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

Persons giving evidence bound to state the truth.

15. The Indian Penal Code, sections 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

Amendment of Penal Code, sections 178 and 181.

16. Subject to the provisions of sections three and five, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

Official oaths abolished.

The Codes of Civil and Criminal Procedure provide for procuring the attendance of witnesses before the Civil and Criminal Courts respectively. The attendance of witnesses before coroners is provided for by "The Coroner's Act," IV of 1871. Act III (B. C.) of 1866 provides for the attendance and examination of witnesses before the Council of the Lieutenant-Governor of Bengal for making Laws and Regulations; and Act XIII (Bom. C.) of 1866 makes similar provisions for the Bombay Council. If a person, upon whom a summons to give evidence or produce a document before a Civil Court has been served, without lawful excuse fails to comply with such summons, the Court may sentence him to pay a fine not exceeding five hundred rupees (section 174 of the Code of Civil Procedure). He is further liable to a civil action for damages under the provisions of section 26 of Act XIX of 1853, which is in force in the Bengal Presidency, or of section 10 of Act X of 1855, which is in force in the Madras and Bombay Presidencies. The provisions of these sections, which are unrepealed and are almost identical, are as follow:—"Any person, *whether a party to the suit or not*, to whom a summons, to attend and give evidence or produce a document shall be *personally* delivered,[1] and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded or kept out of the way to avoid being served with such summons, and any person who being in Court and upon being required by the Court to give evidence, or to produce a document in his possession, shall, without lawful excuse, refuse to give evidence or sign his deposition, or to produce a document in his possession, shall, in addition to any proceedings under this Act" (in section 10, Act X of 1855, "proceedings to which he would otherwise be subject") "be *liable* to the party at whose request the

Consequences of non-attendance of persons as witnesses.

[1] The action will not lie unless personal service have been effected (*Rai Dhanpat Singh Bahadur* v. *Prem Bibi*, 24 W. R. 72).

summons shall have been issued, or at whose instance he shall be required to give evidence or produce the document, *for all damages which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil suit.*"[1] The measure of the damages in such a case is, under English law, the cost of withdrawing the record from trial or of obtaining a postponement; but in India it must be borne in mind that, under the Civil Procedure Code, a plaintiff cannot withdraw from his suit with liberty to sue again without the permission of the Court (section 373, and see *ante*, pages 257-258); and where he could not obtain this permission, and being forced to go to trial lost his cause owing to the default of a material witness, the question of damages might be a much more serious matter. Under English procedure a plaintiff may withdraw without going to trial, at his own option, being liable only for defendant's costs. Persons failing to attend to give evidence or produce documents before the Courts of Justice, civil or criminal, may also be punished criminally with fine or imprisonment, or with both, under the provisions of sections 174 and 175 of the Indian Penal Code.

Persons exempted from personal attendance in Court.

The Code of Civil Procedure exempts from personal attendance in Court women, who, according to the customs and manners of the country, ought not to be compelled to appear in public (section 640). The Local Government may also, at its discretion, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption, and may, at its discretion, withdraw such privilege. Persons exempted from personal attendance under the above provisions can be examined by commission, but they must pay the costs of such commission, unless the party requiring the evidence pay such costs (section 641). There is no similar exemption from attendance before the Criminal Courts; but it has been held that a female not accustomed to appear in public may claim to give evidence sitting in a palanquin, having been previously identified to the satisfaction of the Court (*The Queen on the prosecution of Bibi Rukia Banú* v. *J. B. Roberts*, 1 B. L. R. Short Notes vi).

Protection of witnesses from arrest.

According to English law, witnesses are protected from arrest upon any *civil* process, while going to Court to give evidence, while attending there for the purposes of the case, and while returning home.

[1] Witnesses, who have given evidence, cannot be sued for damages in respect of such evidence. The only penalty they can incur, if they give false evidence, is a prosecution for perjury (*Babu Ganesh Dutt Singh* v. *Magniram Chowdhri*, 11 B. L. R. 328).

Section 642 of the Code of Civil Procedure enacts as follows:—"No Judge, Magistrate or other judicial officer shall be liable to arrest under this Code while going to, presiding in, or returning from his Court. And, except as hereinafter provided, the parties to a suit and their pleaders and recognized agents shall be exempt from arrest under this Code while going to or attending a Civil Court for the purpose of such suit and while returning from such Court. *Witnesses acting in obedience to a summons shall be similarly exempt.*" It has been held in England that this privilege is that of the Court and not of the person arrested; and that an application for discharge may be made either to the Court before which the witness had to appear or to the Court under the process of which the arrest was made. The making of an arrest in violation of the privilege affords no ground for an action for damages. There is no similar protection against *criminal* process.]

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a.*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b.*) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c.*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may in its discretion either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d.*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C, and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C, or D is proved, or may require proof of B, C, and D before permitting proof of A.

[See sections 10 and 104, *ante*.]

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

Order of examination. Direction of re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him[1] so desires) re-examined.

[1] *Sic* in *Gazette* copy of Act.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Provisions of the Code of Criminal Procedure.

[As to the examination, cross-examination, and re-examination of witnesses in criminal cases, see also the following sections of the Code of Criminal Procedure, *viz.*:—section 191, which entitles the accused person or his agent, in proceedings preliminary to commitment, to examine and re-examine his own witnesses, and to cross-examine the complainant and his witnesses—section 214, which extends the provisions of section 191 to the trial of warrant cases by Magistrates—section 218, which entitles the accused person in warrant cases tried by Magistrates to re-call and cross-examine[1] the witnesses for the prosecution after the charge has been read and he has pleaded thereto—and section 247, which enacts that in Sessions trials, after the accused has pleaded to the charge, and the assessors or jurors have been chosen, the witnesses shall be examined, cross-examined, and re-examined according to the law for the time being relating to the examination of witnesses. It may be observed that the Code of Criminal Procedure contains no *express* provision for the cross-examination and re-examination of the witnesses either of the complainant or of the accused in summons cases under Chapter XVI; or for the cross-examination by the complainant or prosecutor of witnesses called by the accused in the course of proceedings preliminary to commitment, or in warrant cases, under Chapters XV and XVII respectively. The Code of Civil Procedure is wholly silent on the subject of cross-examination and re-examination.

Limits of cross-examination.

According to the practice followed in England and Ireland, the cross-examination is not limited to the matters upon which the witness has already been examined-in-chief, but extends to the whole

[1] In *Khurruckdhari Singh* v. *Persadi Mandal* (22 W. R. Cr. Rul. 44), it was held that it is in the discretion of the Court to allow the witnesses for the prosecution to be cross-examined at any period of the defence, and that they must not necessarily be cross-examined before the witnesses for the defence are examined.

case; and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. In America a different rule prevails, it having been determined by the Supreme Court that a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination: and that, if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him as such in the subsequent progress of the cause. In the case of *The Queen* v. *Eshan Dutt and others* (6 B. L. R. Ap. 88) the Calcutta High Court followed the English rule, which has also been substantially adopted by the Indian Evidence Act, for by the above section the cross-examination, provided it relate to *relevant* facts, need not be confined to the facts to which the witness testified on his examination-in-chief. Besides questions relating to relevant facts a witness may further be asked the questions provided for by section 146, *post*. As a general rule, evidence is not legally admissible against a party, who at the time that it was given had no opportunity of cross-examining the witnesses or of rebutting their testimony by other evidence (see *ante*, s. 33; and *Gorachand Sirkar* v. *Ram Narain Chaudhri and others*, 9 W. R. Civ. Rul. 587). In this latter case the lower Courts had improperly admitted as evidence, in a suit for enhancement of rent, the depositions of witnesses taken in another and similar suit. When a case, decided *ex parte*, in the absence of the defendant, who had thus no opportunity of cross-examining the plaintiff's witnesses, was re-admitted to the file and to a hearing, it was held that the Court of first instance ought to have re-called the plaintiff's witnesses and allowed the defendant an opportunity of cross-examining them; and this not having been done, that their previous depositions could not be treated as evidence (*Ram Baksh Lal* v. *Kishori Mohan Saha and others*, 3 B. L. R. A. C. 273). "Whether," says Mr. Taylor, "when a party is once entitled to cross-examine a witness, this right continues through all the subsequent stages of the cause, so that, if he afterwards re-call the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle upon which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that in common fairness each party should alternately have the right of cross-examining such a

witness as to his adversary's case, while both should be precluded, in the course of the respective examinations-in-chief, from putting leading questions with regard to their own."[1] This result will doubtless follow from the above provisions of the Indian Evidence Act, more especially from the definitions given in s. 137. The party who *calls* a witness—apparently, at any stage of the case—examines him in chief. Such examination-in-chief would naturally be directed to the support of his own case, upon which the adverse party would then have the right to cross-examine. If the adverse party again *called* the same witness, he could clearly only examine him in chief. Where a witness called and examined by the plaintiff was not cross-examined on behalf of the defendants, the Court refused to allow him to be called afterwards for the defendants, as the leave of the Court had not been asked and obtained at the close of his first examination (*Makintosh* v. *Nabin Mani Dasi and others*, 2 Jur. N. S. 161).

Use of cross-examination.

Cross-examination, properly conducted, is one of the most useful and efficacious means of discovering truth. "By means of it," says Mr. Taylor, "the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour and of determining the just value of his testimony. It is not easy for a witness subjected to this test to impose on a Court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended."[2] "Where a witness is evidently prevaricating or concealing the truth," says Mr. Alison, "it is seldom by intimidation or sternness[3] of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider

[1] § 1290.

[2] § 1285.

[3] A prisoner's counsel, in a case before the late Baron Anderson, sat down after a lengthened, angry, and ineffectual cross-examination of a witness for the prosecution. "Witness," said the Baron, "do you happen to know what 'cross-examination' means?"—"No, my lord," he replied. "Then I will tell you what it means, sometimes: putting over again all the questions in examination-in-chief, but *in a very cross manner*."

how seeming contradictions may be reconciled. The *most effectual method* is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fail in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases there is no grounds on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are educed; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens that in this way the most important testimony in a case is extracted from an unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal."[1] Bullying and browbeating a witness, misleading him, as for instance by putting questions which assume facts to have been proved, which have not been proved, or that particular answers have been given contrary to the fact—questioning him in a manner which assumes that he has been lying throughout the whole or the greater part of his examination-in-chief—confusing him when stupid—terrifying him when timid—will oftener than otherwise fail to search the mind and conscience of an adverse witness, when suavity of manner, gentleness and courtesy will surely put him off his guard, while rapid and subtle questioning elicits from him innumerable *insignificant* facts as they may appear to him at the moment, but which when put together by a master hand create a whole, in which the most ignorant beholder instinctively recognizes—THE TRUTH.

Object of re-examination.

The proper object of *re-examination* is to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination; and also of the motive or provocation which induced him to use them; to clear up evident misconceptions and errors committed by him while under examination; and to explain new facts which have come out on cross-examination. In England it is not permitted to go further and introduce matter new in itself. Thus proof

[1] Allison's *Practice of the Criminal Law of Scotland*, 546, 547.

on cross-examination of a detached statement, made by or to a witness at a former time, does not authorize proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved. And where a witness had been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not connected with the assertions to which the cross-examination related, *although they were connected with the subject-matter of the suit.* Under the above section of the Indian Evidence Act new matter relevant to the suit may, *by permission* of the Court, be introduced in re-examination; but if so introduced, the adverse party may further cross-examine upon such matter. Under the English rule it may be observed that any hardship is frequently obviated, when a question has been omitted in the examination-in-chief, and as not arising out of the cross-examination cannot be put in re-examination, by asking the Judge to put it—a request which is generally complied with.]

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Cross-examination of person called to produce a document.

[With this section may be read section 164 of the Code of Civil Procedure, which enacts that "any person may be summoned to produce a document, without being summoned to give evidence; and any person, summoned merely to produce a document, shall be deemed to have complied with the summons, *if he cause such document to be produced instead of attending personally to produce the same.*" It may be observed that section 26 of Act II of 1855, which was almost *verbatim* the same as the section just quoted, applied equally to civil and criminal proceedings. It was repealed by Act X of 1861, but only in so far as it was applicable to suits and proceedings under Act VIII of 1859; and it remained in force with respect to criminal proceedings until the whole Act was repealed by the second section of the Evidence Act, neither in which nor in the new Code of Criminal Procedure has the section been reproduced in

Person summoned to produce document merely need not attend personally.

relation to criminal proceedings, to which there are no similar provisions now expressly applicable.

Other points.

The rule contained in the above section is in accordance with the rule of English law. The witness who merely produces a document need not be sworn, and unless sworn he cannot be cross-examined. If a competent witness be intentionally called and sworn, the opposite party is entitled to cross-examine him, although the party calling him has declined to ask him a single question. Where, however, a witness was sworn under a mistake, which was discovered before the examination-in-chief had begun, no cross-examination was allowed; and so, where the examination-in-chief of a witness was stopped by the Judge after he had answered merely an immaterial question. When several prisoners were tried on the same indictment and were separately defended, it was held that a witness called on behalf of one of them, and who gave evidence tending to criminate the others, might be cross-examined on behalf of those others. The Indian Evidence Act does not expressly provide for these cases.]

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

[The practice in England is not to cross-examine, except under special circumstances, witnesses called merely to speak to the character of a prisoner; but there is no rule which forbids the cross-examination of such witnesses.]

Leading question.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

[Mr. Bentham defines a *leading question* to be one which indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you not reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him?—and he observes that, under this form, every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information is in reality *giving*, instead of *receiving*, it. This kind of leading question

has been otherwise described as a question which embodies a material fact, which may or may not have been before known to the witness, and admits of a conclusive answer by a simple negative or affirmative. Such a question ought not to be put even in cross-examination, unless under special circumstances—and it will be observed that this definition of the term "leading question" is somewhat different from that given in the Indian Evidence Act, which provides in section 143 that leading questions may be asked in cross-examination.]

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

When they must not be asked.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

["To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel," says Mr. Taylor, "may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to that part of the examination which is merely introductory of that which is material. With respect even to material points, the Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination, as for instance where the witness, by his conduct in the box, obviously appears to be *hostile* to the party producing him, or *interested* for the other party, or *unwilling* to give evidence. Indeed, if the witness stand in a situation which of necessity makes him adverse to the party calling him, as if he be a *defendant* whom the plaintiff wishes to examine,[1] leading questions may, it seems, be asked him as a matter of right. . . . . Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by *want of recollection*,[2] which a *suggestion* may assist.

Leading questions when usually allowed in examination-in chief.

[1] As in *Radha Jiban Mustafi* v. *Tara Mani Dasi* (12 Moo. Ind. Ap. 380), where this part of the rule was recognized.

[2] "It may frequently happen," says Mr. Starkie, "that a witness, unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers, statements, or other matters sworn to have been made in the course of a conversation."

Thus, when a witness stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognize them if suggested, this was permitted to be done. So, for the purpose of *identification*, the witness may be directed to look at a particular person,[1] and say whether he is the man. So, where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another respecting the contents of a lost letter, and cannot off-hand recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted. So, where a witness is called to *contradict* another, who has denied having used certain expressions, counsel are sometimes permitted to ask whether the particular words denied were not in fact uttered by the former witness; but this rule seems only to apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible. Again, the Court will sometimes allow a pointed or leading question to be put to a *witness of tender years*, whose attention cannot otherwise be called to the matter under investigation; and, indeed, it must always be remembered that the Judge has a discretionary power—not controllable on a bill of exceptions—of relaxing the general rule, whenever and under whatever circumstances and to whatever extent he may think fit, though the power should only be exercised so far as the purposes of justice plainly require."[2] Compare section 1842 of The New York Civil Code:—"A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it." See also section 154, *post*.

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action have been fixed, "it is generally the easiest course," says Mr. Starkie,

[1] If, however, the witness was suspected, this would be improper, and the witness should be told to look round the Court and say if he there saw the person of whom he was speaking. Much depends upon the circumstances of each particular case. For example, if the defence were an *alibi*, it would be clearly improper to ask the witness, "Did you see the prisoner there?"—a question which would be perfectly proper if the defence were that the prisoner, though present at the spot, had no share in the alleged offence.

[2] §§ 1262A, 1263.

"to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and the jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood; and therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction by asking him, when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time."[1] So Mr. Alison says:—"It is often a convenient way of examining, to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that state of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got than by putting separate questions; for the witnesses generally think over the subjects, on which they are to be examined in criminal cases, so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel."[2]

In order to object properly or successfully to questions as leading, it is important to form an accurate idea of what a *leading question* really is. "I wish," said Lord Ellenborough in a case[3] before him, "that objections, to questions, as leading, might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. If questions be asked to which the answer 'yes' or 'no' would be conclusive, they would cer-

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[1] Starkie on Evidence, p. 167.

[2] Alison's *Practice of the Criminal Law of Scotland*, 546.

[3] *Nicholls* v. *Dowding and Kemp*, 1 Starkie's Nisi Prius Rep. 81.

tainly be objectionable: but, in general, no objections are more frivolous than those which are made to questions as frivolous."]

When they may be asked.

143. Leading questions may be asked in cross-examination.

[In order to understand accurately the effect of this section, it will be necessary to bear in mind the definition of a "leading question" given in section 141, *ante*. There are some questions called *leading* in loose parlance, which ought not to be put even in cross-examination. "With respect to the mode of conducting a cross-examination," says Mr. Taylor, "it is admitted on all hands, that *leading questions may* in general *be asked;* but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness which he is to echo back again;[1] neither does it sanction the putting of a question which assumes that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact."[2]]

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

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[1] In *R* v. *Hardy* (24 Howell's State Trials, 755) Mr. Justice Buller said:—"You may lead a witness on cross-examination to bring him directly to the point as to the answer; but must not go the length, as was attempted yesterday, of putting into his mouth the very words which he is to echo back again."

[2] § 1288.

Illustration.

The question is whether A assaulted B.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

[With this section should be read sections 65 and 91, *ante*.

"*The adverse party may object*," &c. But if the case is tried in a Court in which there are no properly qualified practitioners, or if none be employed in the case, or if the adverse party, himself ignorant of the law and of his privilege, do not object—should the Court disallow the evidence until the document be produced or until facts have been proved which entitle the party concerned to give secondary evidence? In criminal cases tried under the provisions of the Code of Criminal Procedure, Act X of 1872, the Court should certainly do so, for section 256 of that Code declares it to be the duty of the Judge, *in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties*. In civil cases there may be more doubt, the Code of Civil Procedure containing no express provision on the subject. See, however, the last portion of the second proviso to section 165 of the Evidence Act, *post*; and consider the effect of section 59, of "must" in section 64, of section 65, and of "shall" in section 66, *ante*.]

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[This section is word for word nearly the same as section 24 of *The Common Law Procedure Act*, 1854 (17 & 18 Vict. Cap. 128), which, however, contains the following additional proviso, *viz.*:—"Provided, always, that it shall be competent for the Judge, at any time during the

trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." This proviso is, however, substantially contained in section 165, *post*. The above section of the Common Law Procedure Act, 1854, altered the rule laid down in the *Queen's case*,[1] *viz.*, that before the witness can be cross-examined as to the contents of a document, the cross-examining counsel must produce it as his evidence and have it read. This rule, as Mr. Taylor remarked, excluded one of the best tests by which the memory and integrity of a witness can be tried, it being clear that, if the object of the cross-examination was to test the witness's memory, this would be entirely frustrated by reading out the letter to him before asking him any questions about it. It was, however, only in accordance with the general principle, which forbids all use of the contents of a written instrument until the instrument itself be produced. Mr. Day, speaking of the section of the Common Law Procedure Act, 1854, remarks—"The effect is this—the witness, in the first instance, may be asked whether he has made such and such a statement in writing, without its being shown to him. *If he denies that he has made it*, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him) and to any parts of it relied upon as a contradiction. *If the witness, instead of denying that he has made the statement*, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the Court and jury. If he is aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, *without its being produced*, on the general rule that if part of any connected conversation or statement be given, the whole may be used; or he may ask the Judge, under the latter part of the section,[2] to require the production of the writing. It must *be always* borne in mind that this section is confined to written statements *made by the witness* relative to the subject-matter of the cause. This section, therefore, does not interfere with the decision in *Macdonnell* v. *Evans* (11 C. B. 930). In that case, upon the cross-examination of a witness, a letter in his own handwriting was shown to him, and he was asked 'did you not write that letter *in answer to a letter charging you with forgery?*' It was held

Rule laid down in the Queen's case altered.

Alteration of the law.

[1] 2 Brodrip and Bingham's Rep. 286.

[2] In India under section 165, *post*.

that the question was inadmissible for *any* purpose, inasmuch as it was an attempt to get at the contents of a written document which might have been produced. As the question, therefore, referred to the contents of a letter written by a third person, and not by the witness, the case is not affected by this section. It is right to notice this, as the Commissioners, in their second report, apparently refer to the case of *Macdonnell* v. *Evans* as one of the judicial decisions proceeding on the rule, which is now superseded."[1]

Where a party gave evidence in his own case, it was held by a majority of two out of three Judges that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not previously been brought against him in respect of a similar claim, upon which he had given evidence, and the verdict of the jury was, notwithstanding, against him—and this, without produeing the record of the proceedings in the previous case (*Henman* v. *Lester*, 31 Law Journal Rep. C. P. 366).

What course is to be pursued, if the document have been *lost* or *destroyed*, and whether in these or in any other cases a *copy* can be used instead of the *original*, are points upon which the English and Indian Acts are alike silent.

The English enactment does not apply to Criminal Courts. The section of the Indian Act applies to all Courts, civil or criminal; and its provisions could, therefore, be applied at trials before the Court of Session to depositions taken before the committing Magistrate. "In criminal cases," says Sir. J. F. Stephen, speaking of the practice in England, "the old rule still applies.[2]" Its most frequent application in practice is that the prisoner's counsel is prevented from asking the witness whether in his deposition before the Magistrate he did not give a different account, unless he puts in the desposition as his own evidence, and so gives the prosecutor the right to reply. This is not really a grievance, for if the contradiction is serious, there is no reason why the depositions should not be put in. If it is trifling, the rule saves time and checks quibbling. Moreover, *the Judge will frequently look at the depositions himself*, and, if he thinks the contradiction important, will read them, which does not give the prosecutor a reply. . . . . This rule is at present in the course of being relaxed in practice. Some Judges act on the principle that the depositions are always in evidence,

Practice in criminal cases as to depositions.

[1] Day's Common Law Practice, p. 214.

[2] The rules on the subject laid down by the Judges will be found in Mr. Taylor's work, § 1304.

and allow counsel to cross-examine on them without putting them in. Mr. Justice Willes acted on this principle on the Midland Circuit throughout the whole of the Lent Assize of 1863"—(*View of the Criminal Law of England, p.* 316.) Mr. Taylor observes that the rules were intended chiefly to check the licence of counsel, and are not binding on the Judges themselves who have a discretionary power of questioning a witness as to any *discrepancy* between his evidence in Court and his former statement without putting in the depositions. The practice in England being thus not definitely settled, let us see what is the practice in India. So far as I am aware, no definite rules have been laid down on the subject; but in the case of *The Queen* v. *Bindaban Bauri and others* (5 W. R. Crim. Rul. 54) the Calcutta High Court suggested that the Sessions Judge should have before him the depositions taken by the committing Magistrate; and, comparing the statements of the witnesses there recorded with the evidence of the same witnesses as given at Sessions, should put questions, the answers to which may clear up discrepancies or possibly elicit facts favorable to the prisoner. The depositions taken by the committing Magistrate are always sent up and are with the Sessions Judge during the trial. The accused can, if he wishes, have a copy of these depositions (see section 201 of the Code of Criminal Procedure). He or his counsel or pleader can therefore inform himself of what the witnesses said before the Magistrate, and is in a position to question any witness who varies in the Court of Session from his former statement. If a *copy* of the depositions given before the Magistrate be not sufficient for the purpose of the above section of the Indian Evidence Act (which I apprehend that it would), the Sessions Judge ought, if asked, to allow the original deposition to be used. Where the Sessions Judge himself noticed the discrepancy and it was material, there can be little doubt that, in using the original deposition for the same purpose himself, he would be acting wholly within the scope of his duty as indicated by the provisions of the Evidence Act and of the Code of Criminal Procedure. In connection with the subject it will further be important to consider the provisions of section 249 of the Code of Criminal Procedure, *ante*, page 179; and also of section 126 of the same Code, which is as follows:—"A Police officer, making an investigation under this chapter, shall, day by day, enter his proceedings in the investigation in a *diary*, setting forth the time at which the complaint or other information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained

Practice in India.

Police Diaries.

by his investigation. Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and *may use such diaries to aid it in such inquiry or trial.*[1] Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them merely because they are referred to by the Court; but *if they are used by the Police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such Police officer*, the provisions of the law relating to documents used for such purposes shall apply to them."

"Questions not unfrequently arise," says Mr. Taylor, "as to whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting; but the practice seems to be as follows:—If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, or respecting the character of the handwriting, his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, a sight of the document may then be demanded by the opposite counsel." (§ 1307).

The section at present under notice relates to previous statements *made in writing or reduced into writing*. If, however, the previous statements have been *verbal* and not reduced to writing, they may be proved in order to contradict if only they be relevant to the issue[2] (see para. 3, section 155, *post*). Whether the witness's attention must first be drawn to a previous verbal statement, and whether he must be asked if he made such a statement before his credit can be impeached by independent evidence, is a point not provided for by the Indian Evidence Act; but there can be little doubt that here also the circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned to the witness, and he ought to be asked whether or not he made such a statement. Where, as so frequently happens in India, a witness neither denies nor admits having made a former contradictory statement, but replies that he does not remember, the following provision of the Common Law Procedure Act,

Previous verbal statements.

[1] *i. e.* not to use them as evidence but to discover further evidence or possible sources of evidence, which, if brought before the Court, may throw additional light upon the guilt or innocence of the accused.

[2] As to contradicting a witness by contradictory statements made to the Police, see *Reg.* v. *Uttamchand Kapurchand*, 11 Bom. H. C. Rep. 120.

1854 (section 23), is most useful, and might well have been introduced into the Act, *viz.* :—"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, *does not distinctly admit* that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."]

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) to test his veracity;

(2) to discover who he is and what is his position in life; or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

[The words "*in addition to the questions hereinbefore referred to*" in section 146 are to be read with para. 2 of section 138, *ante*, which provides that the cross-examination must relate to *relevant* facts, although it need not be confined to the facts to which the witness testified on his examination-in-chief. In addition, then, to questions which relate to relevant matters, a witness may further be asked the questions mentioned in section 146. But these latter questions may or may not relate to relevant matters. If they relate to *relevant* matters, the witness must answer, whether or not his answer will criminate him or tend to criminate him, or expose or tend directly or indirectly to expose him to a penalty or forfeiture of any kind (sections 132 and 147[1]); and

[1] It might almost appear that section 147 is superfluous, unless it was intended that a distinction is to be drawn between "*relevant to the suit or proceeding*" in section 147, and "*relevant to the matter in issue in any suit or in any civil or criminal proceeding*" in section 132.

evidence will be admissible to contradict his answers. If the questions relate to *irrelevant* matters, it will, generally speaking, be in the discretion of the Court to compel him to answer or not (section 148), and evidence will *not be admissible to contradict the answer when given*, unless in the cases provided for by the *Exceptions* to section 153, *post.* This is all in general accordance with the rules of English law on the same subject.]

Court to decide when question shall be asked and when witness compelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight decree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4.) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

[The words "*not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character*" in the

above section, would seem to be synonymous with the words "*relevant to the inquiry only in so far as it tends to shake his credit by injuring his character*" in section 153, *post*: and the result appears to be that section 148 assumes it as a general proposition that *a witness cannot be compelled to answer irrelevant questions*; and section 153 assumes it as a further general proposition that, *if a witness do answer an irrelevant question, his answer cannot be contradicted by other evidence, but that his answers to relevant questions may be so contradicted.* Section 148 then provides that when a question, although irrelevant, affects the credit of the witness by injuring his character, the Court shall have a discretion (for the exercise of which certain rules are laid down) as to compelling an answer:—and section 153 enacts that where such a question has been answered, the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply, save and except in two cases; but that, if the witness answers falsely, he may afterwards be charged with giving false evidence. It may be observed that this provision as to a charge for giving false evidence is unnecessary in India, where it is not essential in order to a prosecution for "*giving false evidence*," according to the definition of this offence in the Penal Code, as it is in England to a prosecution for *perjury*, that the matter charged as false should have been material to the issue.

Is witness, compelled to answer, protected?

If the witness, either of his own accord or being compelled by the Court, answer a question which is irrelevant, or which is relevant only in so far as it affects his credit, and if such question criminate him or expose him to a penalty or forfeiture, is he entitled to the protection afforded by section 132, *ante*? It would appear that he is not. But it is submitted that the protection should be extended to such a case.

The second proviso to section 165, *post*, should be borne in mind in connection with this section.

With reference to clause (2) it may be observed that where the facts, which form the subject of the question, are comparatively *recent*, they are more important as bearing upon the moral principles of the witness than when they are of remote date, because a man may reform and become in later years incapable of conduct to which in earlier life he was prone. "The interests of justice," says Mr. Taylor, "can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant."[1]

[1] It may be observed that it may amount to *defamation* in India and to libel in England to publish even the truth about a person when the truth is so old that it cannot be for the public good that it be made known—see Exception 1 to section 499 of the Indian Penal Code: and 6 & 7 Vict. Cap. 96, sec. 6.

With reference to clause (4), see Illustration (*h*), section 114, *ante*, and also the other matter which may be considered in connection with the same Illustration. Mr. Taylor observes as follows:—"It has been stated more than once, that, if the witness declines to answer, no inference of the truth of the fact can be drawn from that circumstance; but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness. A perfectly honorable but excitable man may occasionally repudiate a question which he regards as an *insult*, and to infer dishonor from his conduct would, of course, be *unjust*: but, generally speaking, an honest witness will be eager to rescue his character from suspicion and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory." [1]]

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Question not to be asked without reasonable grounds.

Illustrations.

(*a*.) A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b*.) A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c*.) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d*.) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

[1] § 1321.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

[These sections were substituted while the Bill was in Committee for certain other sections in the original draft, which, said Sir J. F. Stephen in his speech on the passing of the Bill, "provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that, if the Court considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation." Sir J. F. Stephen proceeded to remark—"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposals were, I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable; in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient; and, in the third place, and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the character of witnesses should be open to full inquiry. These reasons satisfied the Committee and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them, which I think will in practice be found sufficient." Speaking, then, of the substituted sections, including sections 146 to 152, he said:—"The object of these sections is to lay down, in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their

History of these Sections.

credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honorable advocates and by the public."[1]

See the second proviso to section 165, *post*.]

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

[These sections are in general accord with English law, which is, however, not quite settled on the subject of *degrading* questions. The result of section 151 will be that the Court cannot forbid *indecent* or *scandalous* questions, if they *relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.* If they have, however, merely *some bearing on the questions before the Court*, the Court has a discretion, and *may* forbid them. "If a woman," says Sir J. F. Stephen, in his *General View of the Criminal Law of England*, "prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had not had an illegitimate child ten years before, though circumstances *might* exist which might render such an enquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason."

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[1] *Proceedings of the Legislative Council of India*, pages 237-238 of the *Supplement to the Gazette of India* of 30th March, 1872.

Where a question is intended to *insult* or *annoy*, or is *needlessly offensive in form*, it is made the duty of the Court to interpose for the protection of the witness.]

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a.*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b.*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c.*) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the

alleged fact that B was seen on the day in question in Lahore.

[See for a similar example *Reg* v. *Sakhâram Mokundji*, *&c.* 11 Bom. H. C. Rep. 169.]

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d.*) A is asked whether his family has not had a blood feud with the family of B, against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

["With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down," says Mr. Taylor, "that if the questions relate to *relevant* facts the answers may be contradicted by independent evidence; if to *irrelevant*, they cannot."[1] The Indian Evidence Act does not lay down this rule anywhere in so many words; but the provisions of the Act as to *relevancy* and other matters necessarily involve this rule (see *ante*, page 621). Mr. Taylor further remarks that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not connected with the cause or the parties.[2] The Indian Evidence Act adopts the same principle. The Exceptions to the rule contained in the above section are taken from English law—the *first*, from the 25th section of the Common Law Procedure Act,[3] 1854, which enacts that a witness may be questioned as to whether he has been convicted of any felony or misdemeanour and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction;[4] the *second* being in accordance with a strongly intimated opinion of the Barons of the Exchequer in the case of *The Attorney-General* v. *Hitchcock*.[5]

Consider in connection with this section *Illustrations* (*n*) and (*o*) to section 141 and section 15, *ante*.]

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[1] § 1295.

[2] § 1295.

[3] 17 & 18 Vict. Cap. 128.

[4] The rest of this section relates to the mode of proving the conviction by a certificate, as to which, in India, see *ante*, page 300.

[5] 1 Welsby, Hurlestone, and Gordon's Exch. Rep. 94—102.

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Question by party to his own witness.

[In the exercise of the discretion here conferred, the Court will properly allow such questions to be put, when a witness unexpectedly turns out to be hostile to the party who calls him, or is manifestly interested for the other party, or is unwilling to give evidence; or if the witness stand in a situation which naturally makes him adverse to the party who desires his testimony, as, for example, a defendant called as the plaintiff's witness (*Radha Jiban Mústafi v. Tara Mani Dasi*, 12 Moo. Ind. Ap. 381), or a plaintiff called as the defendant's witness.

In America a rule prevails which is the converse of the above. A Judge may, in his discretion, prohibit leading questions from being put to an adversary's witness who shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to his cause. The Indian Evidence Act does not contain any similar provision.]

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

Impeaching credit of witness.

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2.) By proof that the witness has been bribed or has [accepted[1]] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

[1] The word in brackets was substituted for "had" by section 11 of the amending Act, XVIII of 1872.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a.*) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b.*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

[It was laid down by Lord Ellenborough in *R.* v. *Watson* (2 Stark, 149), that the only modes of *impeaching the credit* of a witness are by cross-examination, by producing the record of his conviction of some infamous crime, or by adducing general evidence that he is unworthy of belief upon his oath. See also *Spencely* v. *De Willott*, 7 East, 108. In the case of *The Attorney-General* v. *Hitchcock* (1 Exch. Rep. 91), a witness, who had given material evidence for the Crown on the trial of an information under the revenue laws, was asked in cross-examination whether he had not *said* that the officers of the Crown had *offered* him £20 to give that evidence. He denied that he had ever said so, and the Court held that evidence was not admissible to contradict him.[1] The question was irrelevant to the suit, and the

[1] The following case carries this rule to its extreme limits:—On a trial for rape in Ireland, a witness was called for the prisoner, who, professing his ignorance of English, was sworn in Irish, and had the advantage (important to a dishonest witness) of giving his evidence through an interpreter. He was pressed in cross-examination as to his knowledge of English, and was asked if he had not recently spoken English to two persons present in Court. He denied it—and it was held by seven, out of ten Judges, that these two persons could not be called to contradict him (*R.* v. *Burke*, 8 Cox's Criminal Cases, 44).

usual rule was followed that the answer to an irrelevant question cannot be contradicted. The *offer* of a bribe not shown to have been accepted would be no ground for impeaching the impartiality of the witness (see Exception 2, section 153, *ante*): but the fact of a witness having accepted a bribe, or the promise of a bribe, is a ground upon which the credit of a witness may very reasonably be impeached; and the second clause of the above section embodies this view.

It may be important to distinguish between *contradicting a witness* and *impeaching the credit of a witness*—expressions which are sometimes used as synonymous, but between which a distinction appears to be made by the Evidence Act. Mr. Taylor states (§ 1324) the first of the modes in which the *credit of a witness may be impeached* to be that witnesses may be called to *disprove* such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue; and the omission of this mode in the above section of the Evidence Act appears to have suggested doubts[1] as to whether the Indian Legislature did or did not intend to allow the testimony of a witness to be contradicted by other evidence disproving the facts stated by him. It has been already shown (*ante*, pages 621, 626) that, where these facts are relevant, the Evidence Act assumes that evidence may be given to contradict; and, while declaring generally that evidence may not be given to contradict the answers to questions, which are relevant to the inquiry only in so far as they tend to shake the credit of a witness by injuring his character, the act makes two exceptions[2] to this rule (Exceptions 1 and 2, section 153). That the Evidence Act nowhere lays down a rule that the testimony of a witness may be contradicted by evidence disproving the facts stated by him, is doubtless because the authors of the Act regarded this as a rule not of evidence, but of procedure. It is not the fact that, in all cases and under all circumstances, the testimony of a witness as to relevant facts can be contradicted by evidence disproving such facts. In *R.* v. *Hilditch* (5 C. & P. 299) it was laid down that evidence, which is a confirmation of the original case, cannot be given as evidence in reply; and that the

[1] See the observations in *Reg.* v. *Sakhárám Mukundji*, &c. 11 Bom. H. C. Rep. 169.

[2] In these two exceptional cases the evidence is allowed to contradict answers to *questions actually put*. The evidence allowed by section 155 to impeach the witness' credit may apparently be given, although the witness has not been questioned upon the point, unless some other portion of the Act prohibit it—see *e. g.* section 145. The words "liable to be contradicted" in clause 3 of section 155 can scarcely be limited to the two exceptional cases, which form the exceptions to section 153.

only evidence which can be given in reply is that which goes to cut down the defence without being any confirmation of the original case. "If several issues be joined," says Mr. Taylor, "some of which lie on either party, the plaintiff may, at his option, go into the whole case in the first instance, or he may content himself with adducing evidence in support of those issues which he is bound to prove, reserving the right of rebutting his adversary's proof in the event of the defendant establishing a *primâ facie* case with respect to the issues which lie upon him. The latter course is the one which, in practice, is most usually adopted, and the defendant may then have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. *If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence in reply;* for if such a privilege were allowed to the plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length. . . . . It is tolerably clear that, where there is only one issue, the onus of proving which lies on the plaintiff, he must put forth all his evidence in the first instance, and cannot rely on a *primâ facie* case, and, after that case has been shaken by the defendant's proof, call other evidence to confirm it. . . . . In deciding upon the admissibility of evidence called in reply, regard must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the Judge in the exercise of his discretion."[1] Whether then evidence may be given to disprove relevant facts deposed to by a witness depends upon the mode in which an advocate elects to conduct his case. The rules now provided by the Code of Civil Procedure, and which have been already stated (*ante*, pp. 593-594), are substantially those set forth by Mr. Taylor.

When party may discredit his own witness.

The credit of a witness may be impeached not only by the adverse party, but also, *with the consent of the Court, by the party who calls him.* This provision is analogous to that contained in the previous section, which allows a party under certain circumstances to cross-examine his own witness. "The question how far a party is at liberty to discredit his own witness," says Mr. Taylor, "is one which for years has been agitated in Westminster Hall, and which at length has been settled by the Legislature. The Common Law Procedure Act of 1854 contains, in § 22, the following salutary, though ill-drawn, enactment on this subject:—'A party producing a witness shall not be allowed to

[1] §§ 357-359, and see the authorities there referred to.

'impeach his credit by *general evidence* of bad character, but he may, 'in case the witness shall, in the opinion of the Judge, prove adverse '(i. e. *hostile* as contradistinguished from being merely *unfavorable*), 'contradict him by other evidence, or, by leave of the Judge, prove that 'he has made at other times a statement inconsistent with his present 'testimony; but before such last-mentioned proof can be given, the 'circumstances of the supposed statement, sufficient to designate the 'particular occasion, must be mentioned to the witness, and he must be 'asked whether or not he had made such statement.' This enactment has been in great part borrowed from the New York Civil Code. In India proof may be given of former statements made by the witness and inconsistent with any part of his evidence which is liable to be contradicted. If such statements were made in writing, or reduced into writing, the witness' attention must have been called to those parts of it which are to be used for the purpose of contradicting him, before such proof can be given (section 145, *ante*). If they are verbal merely, and not in writing, there is no express similar restriction in the Act.

"It occasionally happens," says Mr. Day (Common Law Practice, p. 203), "that a witness called under a belief that he will prove a certain fact, turns round upon the party calling him, and proves directly the reverse. The party calling the witness was *not precluded from proving by other testimony what the witness had negatived: but whether he ought to be allowed to discredit his own witness*, either by impeaching his character or by showing that he had previously made statements at variance with the evidence given by him, was a point upon which the decisions of the Courts were conflicting." That evidence to discredit ought to be admitted under such circumstances was strongly argued by Lord Denman in the case of *Wright* v. *Beckett* (1 Moody and Robinson's Rep. 414). "If," said His Lordship, "the witness professing to be mine has been bribed by my adversary to deceive me,—if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly-invented falsehood which defeats my just right, and throws discredit on all my other witnesses, must I be prevented from showing the jury facts like these? Suppose that, in some dispute happening in the street, a bystander declares his name to one of the contending parties, and his readiness to prove his conduct blameless, but when sworn in open Court takes part with his adversary. The question then is, whether *he* is to be believed or the *other witnesses* of the same party. Some one in Court happens to know him and whispers to the attorney—'He has deceived you in 'every way: he has given you a false name; he is the adversary's brother

'and partner: moreover, he has been for years notoriously infamous.' Or suppose such a trial for misdemeanour as some that have lately revolted the public mind; and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against discrediting your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him; you must take him for better and for worse, and must be bound by all his statements. Or, if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness-box. The rule, therefore, is limited by that condition; and you shall be at liberty to discredit your witness by such evidence, because you have been deceived and surprised. Can any reason then be assigned why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which, from whatever motive, he has fallen? It is clear that, in civil cases, the exclusion might produce great injustice and in criminal cases improper acquittals and fraudulent convictions." These arguments convinced the English Law Commissioners of 1850.]

Questions tending to corroborate evidence of relevant fact admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents, unconnected with the robbery, which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact.

[According to the practice in England, evidence of prior statements is not generally admissible to corroborate a witness. "His having given a contrary account," says Mr. Starkie, "although not upon oath, necessarily impeaches either his veracity or his memory; but *his having asserted the same thing* does not in general carry his credibility further than, nor so far as, oath."[1] Chief Baron Gilbert was, however, of opinion, that the party who called a witness, against whom contradictory statements had been proved, might show that he had affirmed the same thing before on other occasions, and that he was therefore '*consistent with himself;*'[2] and this opinion was followed in section 31 of the repealed Act, II of 1855, the provisions of which have been simplified and reproduced in the above section. The statement, which may be proved under the section in order to corroborate, may be a statement made either on oath or otherwise, and either in ordinary conversation or before some person who had authority to question the person who made it. It may also be verbal or in writing. If not made before any person legally competent to investigate the fact, it would seem that it must have been made *at or about the time when the fact took place.* In India, perhaps more particularly than in other countries, the statements made by those who have knowledge of the circumstances connected with the commission of an offence, immediately after the occurrence and before they can be tampered with by the Police or others, are important to the ascertainment of truth.

See *Illustrations* (*j*) and (*k*) to section 8, *ante*.]

158. Whenever any statement, relevant under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the

What matters may be proved in connection with proved statement relevant under section 32 or 33.

[1] Starkie on Evidence, page 253.

[2] Gilbert on Evidence, page 135.

credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treaties.[1]

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows

[1] *Sic* in Gazette, but evidently a mistake for *treatises*.

that the books were correctly kept, although he has forgotten the particular transactions entered.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Right of adverse party as to writing used to refresh memory.

[The committing of a statement of any kind to writing, as remarked by Mr. Bentham, calls forth unavoidably a greater degree of attention than the exhibition of it *vivâ voce* in the way of ordinary conversation. If this be done honestly at the time of the occurrence, which forms the subject of the statement, or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth—more reliable than "slippery memory." It is not necessary that the witness, after having seen the writing, should have any *independent or specific recollection* of the facts stated therein. It will be sufficient if he remembers that he has seen the paper before, and is sure that when he saw it, the *facts were correctly recorded therein* (section 160). It has even been held to be sufficient if the witness, having no recollection of the circumstances, or of having before seen the paper, can recognize his signature or writing, and so vouch for the accuracy of the memorandum. These points, though they do not affect the *admissibility* of the evidence, must yet be considered in deciding on the amount of *value* to be assigned to it. Where the witness had become *blind* since the writing was made, it was held that it might be read over to him. A writing used to refresh the memory of a witness does not thereby itself become evidence. It is not necessary, therefore, that the writing should be *admissible* in evidence in order to be so used. Thus, a receipt, which cannot be put in for want of a stamp, may be used by a witness to refresh his memory. Section 159 substantially follows the English rule as *to the time when the writing must have been made*, this rule being that a writing can be used to refresh the memory of a witness only where it has been made or its accuracy recognized *at the time of the fact in question, or, at furthest, so recently afterwards as to render it probable that the memory of the witness had not then become defective.* In one case a witness was not allowed to look at notes, prepared some weeks

Rules as to refreshing memory discussed.

after the transaction, and when he had reason to believe that he would be called upon to give evidence. If the memoranda were prepared subsequently to the event at the instance of the party calling the witness, they would be inadmissible, for otherwise a door might be opened to the greatest fraud. Under Indian, as well as English law the writing may have been made by *some other person*, provided the witness examined it and knew it to be correct when the facts were fresh in his mind. Thus a witness at Sessions might be shown his former deposition before the committing Magistrate, in order to refresh his memory, a couple of months after, if such first deposition were taken immediately after the occurrence. A Police officer, called as a witness to prove facts seen or discovered during his investigation, may look at notes of the investigation made by himself or another Police officer who accompanied him, though such notes would of themselves be inadmissible in evidence (see section 119 of the Code of Criminal Procedure, and as to Police Diaries, section 126 of the same Code.)

"Whether the witness can refresh his memory by reference to a mere copy of his original memorandum, is," says Mr. Taylor, "a question of some difficulty and doubt. In several cases he has been allowed to do so, where, having looked at the copy, he was enabled *to swear positively to the facts from his own recollection*: but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy. Even then it may be questionable whether the copy should be used, so long as the original is in existence and its absence unexplained; for there is much weight in the remark[1] of Mr. Justice Patteson, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself or be merely used to refresh the memory. Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness *have no independent recollection* of the facts narrated therein, the original must be used. The case of *Burton* v. *Plummer* in no way contravenes this rule. There the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a *ledger*. The transactions in trade had been noted by a clerk in a waste-book as they occurred, and the plaintiff, day by

Use of a copy to refresh memory.

[1] In *Burton* v. *Plummer*, 2 Adolphus and Ellis's Rep. 344.

day, had copied the entries into the ledger, each entry being at the same time checked by the clerk. Under these circumstances the Court very properly regarded the ledger as an original and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne* v. *Mackenzie*,[1] where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers and compiled from his original notes, of which it was substantially though not verbally a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations which the witness, if time were given him, could repeat without their aid"—(§§ 1265, 1266).

It is to be observed that section 160, which allows a document to be used to refresh the memory where the witness has no *specific recollection of the facts themselves*, is silent as to the use of a *copy* in this particular case.

Right of opposite party to see document.

The writing must be produced and shown to the adverse party, if he requires it, and such party may, if he pleases, cross-examine the witness upon it. The rule of English law is similar, and the adverse party by looking at the writing or examining the witness respecting the entries, which *he has used* to refresh his memory, does not adopt the document as part of his evidence. But it might be otherwise if he were to ask questions as to other parts of the document. If the paper fail to refresh the witness' memory, it has been held that the adverse party is not entitled to look at it, and if he do so, he may be required to put it in as evidence.

Paragraph 1843 of the New York Civil Code contains provisions very similar to the above. "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it and may read it to the jury. So also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution."

Provisions of New York Civil Code.

[1] 2 Adolphus and Ellis's Rep. 341.

Scotch Law.

Mr. Alison, in his "Practice of the Criminal Law of Scotland," thus explains the Scotch Law on the subject:— "The rule is that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow a witness to look to memoranda, made at the time, of dates, distances, and appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony; or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition" (the preliminary investigation of Indian law), "signed by him and libelled on as a production" (*i. e.* to be produced as the ground of a charge) "at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial and much more correctness and accuracy is obtained than could possibly have been expected if the witness were required to state from memory all the particulars of the stolen articles, at the distance, perhaps of months, from the time when they were lost. With the exception, however, of such memoranda, notes, or inventories made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and *vivâ voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule, in the case of medical or other scientific reports or certificates, which are lodged in process before the trial and libelled on as productions in the indictment and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report. The reason of this exception is founded in the consideration that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed, that they cannot with safety be entrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and, from their situation and rank in life, are much less liable to suspicion than those of an inferior class

or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a further examination by the prosecutor or a cross-examination on the prisoner's part." In India the rule is slightly different, though similar in principle. When a dead body is sent to the Civil Surgeon in order to the making of a *post mortem* examination, a printed form is sent therewith, which the Civil Surgeon fills up on examining the body. This report is not itself legal evidence (2 W. R. Crim. Let. 14; 6 W. R. Crim. Let. 3); but it is usually placed in the hands of the Civil Surgeon, who refreshes his memory from its contents when giving his testimony.]

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

[A document would be in the *custody* of a person who held it for another person, the owner thereof; and it might be said to be in the *possession* of either of such persons. It would be in the *power* of any person, who could effect its production, either personally or by means of his agent. It has been held by the Bombay High Court that a *partner* may be compelled to produce documents belonging to the firm

in a suit in which his co-partners are not parties (*Haji Joharia* v. *Haji Casim*, I. L. R. 1 Bom. 496). The cases are here quoted and discussed, but the point is not free from doubt.

English Law.

The rule of English Law is similar, namely, that when a witness is served with a *subpœna duces tecum* (summons to produce documents), he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the Judge, who will decide upon the validity of any excuse that may be offered for withholding them. So the fact that the legal custody of the instrument belongs to another person will not authorize a witness to disobey the subpœna, provided the instrument be in his actual possession; but documents filed in a public office are not so in the possession of the clerk, as to render it necessary or even allowable for him to bring them into Court without the permission of the head of the office.[1]

Validity of objection how determined.

The validity of any such objection, i. e. *made by the person producing the document*, shall be decided on by the Court. The section does not contemplate the case of objections made by the opposite party, which must be determined by the usual rules. In order to decide on the validity of the objection, *the Court may take other evidence to enable it to determine on its admissibility*. "It frequently happens," says Mr. Taylor, "that the admissibility of a witness or an instrument is found to depend on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the Judge, and adjudicated on by him *alone*"—(§ 22). In cases tried with a jury, the province of the Judge in this respect remains the same (see section 256 of the Code of Criminal Procedure). The Court may, if it sees fit, *inspect the document, unless it refers to matters of State*. This is scarcely in accordance with the rule in England, where it has been decided that when an attorney claiming the privilege of his client objects to produce a document entrusted to him by such client, the Judge ought not to look at the writing to see whether it is a document which may properly be withheld. There have, however, been cases in which the Judge has inspected documents in order to decide upon their admissibility. If it be objected on the one side that it is impossible for a Judge, who discharges the functions of Judge and jury, to avoid receiving some impression from the document if he *do* look at it, it may be urged on the other side that the rule of inspection provides a safeguard against futile or dishonest objections, and effects a great saving of the time of the Court.

[1] Taylor, § 1121.

As to State documents, see *ante*, pages 541—543. In the recent case of *Kain* v. *Farrer* (37 L..T. Rep. N. S. 469) the defendant was the Secretary to the Board of Trade, and the action was brought by a ship-owner for the alleged wrongful acts of the servants of the Board in detaining a vessel on the ground that she was unseaworthy. An order for discovery of documents was made at the instance of the plaintiff. The defendant Secretary thereupon made an affidavit *that he had in his official control, custody or possession, as Secretary to the Board of Trade, certain official documents; and that he objected on the ground of public policy* to state anything further with respect to those documents. It was held that this affidavit was not sufficient; that there must be some ground for a Judge to exercise his discretion upon, and decide that a high officer of the State may, without giving any reason why, state that it is against the public interest that a particular document should be produced; that enough should be given to show that the mind of the Head of the department has been brought to bear upon the particular question, and that he thinks that it would be against public policy to do what is asked. "The common rule," it was said, "as gathered from *Beatson* v. *Skene*, and acted upon in a recent case[1] by Lord Coleridge, is that the Court is entitled to have the pledge and security of the Head Officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness-box and there say that he is the Head of the department and objects to such and such documents being produced, specifying them, on the ground of public policy. The defendant in this case does not even say he is instructed by the Head of his department to refuse this discovery, though I have no doubt that that is in fact the case." In the *Loknathpur case* recently decided by the Calcutta High Court, the Magistrate of a district refused to produce a written report made to him by a Magistrate in charge of a division of a district as to the result of an inquiry made by the latter under the provisions of section 135 of the Code of Criminal Procedure into the cause of a sudden and unnatural death. When the case came before the High Court, the District Magistrate appeared in Court with the report, ready to produce it, if the High Court held it not to be privileged, or to show it to the Judges, if they desired to see it before making their order. It was ultimately decided that this report was not a judicial proceeding, and that the District Magistrate was justified in refusing to produce it.

[1] *Swann* v. *Vines*, tried at Westminster, November, 1877.

In connection with the subject of the translation of documents may be noticed section 340 of the Code of Criminal Procedure, which provides that in cases in which documents are put in for the purpose of *formal proof*, it shall be in the discretion of the Court to interpret to the accused as much thereof as appears necessary (see also *The Queen* v. *Amirudin*, 7 B. L. R. 71).]

Translation of documents for accused persons.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving as evidence of document called for and produced on notice.

["The production of papers upon notice," says Mr. Taylor, "does not make them evidence in the cause, *unless the party calling for them inspects them*, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue. The reason for this rule is that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties"—(§ 1614).]

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Giving as evidence of document, production of which was refused on notice.

Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

["If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind; and, therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness; neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination, or to produce and prove it as part of his own case."[1]

Rule of English Law.

See sections 66 and 89, *ante*.]

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Judge's power to put questions or order production.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections one hundred and

[1] Taylor, § 1615.

forty-eight or one hundred and forty-nine ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

[This is a most important section. Its provisions, though they may be in some respects not in accordance with English ideas, are wholly suited to the state of things which exists in India out of the Presidency Towns. In his speech on the occasion of the Bill becoming law, Mr. (now Sir J. F.) Stephen said as follows :—" I say that, throughout India generally, nothing like the English system under which the Bench and Bar act together and play their respective parts independently does now exist, or can for a length of time be expected to exist. Let me just re-call for a moment the nature of that system. In the first place, the Bench and the Bar in England form substantially one body. The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges. That is not the case in India, nor anything like it. The great mass of Indian Judges are not, and never have been, lawyers at all ; the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so. Even in the Presidency Towns, the whole organization of the profession differs from that of England in ways which I do not think it necessary to refer to, but which are of great importance. I may, however, observe that the position of an English Barrister who practises in the Mufassil, whether he is habitually resident in a Presidency Town or not, is altogether different from that of an English Barrister in his ordinary practice in England. An English Barrister on Circuit, and even at the Quarter Sessions, is subject to a whole series of professional restraints and professional rules, which do not, and cannot apply to practice in the Mufassil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon them. He practises in important cases before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer. No one of these remarks applies to a Barrister from a Presidency practising in the Mufassil. . . . . Passing, however, from the case of English Barristers to the case of pleaders and vakils, and the Courts before which they practise, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what questions it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their res-

Sir J. F. Stephen's Observations.

pective parts independently, what I mean is that in England cases are fully prepared for trial before they come into Court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how, the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that section 165, which has been so much objected to, has been framed."[1]

The above section applies to both civil and criminal proceedings. In criminal proceedings, however, still greater power is given to a Sessions Judge by section 256 of the Code of Criminal Procedure, which is as follows:—"It is the duty of the Judge to decide all questions of law, and especially all questions as to the relevancy of facts which it is proposed to prove, the admissibility of evidence or the propriety of questions asked by parties or their agents which may arise in the course of the trial; and, *in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties*;—to decide upon the meaning and construction of all documents given in evidence at the trial;—to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;—to decide whether any question which arises is for himself or for the jury; and upon this point his decision shall be final. The Judge may, if he thinks proper, in the course of his summing

Duty of Sessions Judge in Criminal Cases

[1] *Proceedings of the Legislative Council of India*, page 240 of *The Supplement to the Gazette of India* of March 30th, 1872. In his *Introduction* to the Evidence Act subsequently published, he further remarks:—"When a man has to inquire into facts of which he receives in the first instance very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report, and facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a laywer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of the Evidence Act. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever."

up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding.

Illustrations.

(*a.*) It is proposed to prove a statement made by a person not called as a witness under circumstances which render evidence of his statement admissible.

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved.

(*b.*) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed."

Civil cases are not tried with a jury in any of the Courts in India, the Judge being in all cases judge both of law and of fact, and discharging the functions of both judge and jury. Criminal cases in the Court of Session are tried by jury in those districts in which the Local Government has, under the provisions of section 233 of the Code of Criminal Procedure, directed that the trial of all offences, or of any particular class of offences, shall be by jury. Criminal trials before the Court of Session in which a European (not being a European British-born subject) or an American is the accused person or one of the accused persons, *must* be by jury (section 234, *idem*). The duty of the jury is thus defined by section 257 of the Code of Criminal Procedure:—"It is the duty of the jury—

Duty of Jury.

(1) to decide which view of the facts is true, and then to return the verdict which, under such view, ought, according to the direction of the Judge, to be returned; —(2) to determine the meaning of all technical terms and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;—(3) to decide all questions declared by the Indian Penal Code or any other law to be questions of fact;—(4) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(*a.*) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(*b.*) The question is whether a person entertained a reasonable belief on a particular point, whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury."

As to the power of jurors or assessors to put questions to the witnesses, see section 166, *post*.

Power of Judge to send for additional witnesses.

Under the provisions of sections 120 of the Code of Civil Procedure, the Court may direct any *party* to a suit to appear in person for examination; and under the provisions of section 171 of the same Code, if the Court at any time thinks it necessary to examine *any person other than a party to the suit* and not named as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence or to produce any document in his possession. So, a Magistrate, making an inquiry into a case triable by the Court of Session or High Court, may, at any stage of the proceedings, summon and examine any person whose evidence he considers essential to the inquiry, and may re-call and re-examine any person already examined (section 192 of the Code of Criminal Procedure): and this power is by section 214 of the same Code extended to a Magistrate trying warrant cases. Section 351 of the same Code further enacts that any Court or Magistrate may, at any stage of any proceeding, inquiry or trial, summon any witness or examine any person in attendance, though not summoned as a witness, and *it shall be its or his duty to do so if the evidence of such person appears essential to the just decision of the case.* In the case of *Tarini Charan Chaudhri* v. *Saroda Sundari Dasi* (3 B. L. R. A. J. C. 158) it was decided that when a party to the suit or a witness is summoned by the Court, such witness is liable to be cross-examined by the parties. The provisions of the present section, forbidding the cross-examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge, may be held to alter the rule above laid down. They may, however, be intended to apply rather to particular questions put to a witness already before the Court than to the whole examination of a witness called by the Court."

Cross-examination of witnesses called by the Court.

Should Judge in Civil Cases reject inadmissible evidence, if not objected to by the parties?

We have seen that the law (section 256 of the Code of Criminal Procedure, *ante*, page 645) expressly makes it the duty of a Sessions Judge in criminal cases to prevent the production of inadmissible evidence, whether it is or is not *objected to by the parties*. The duty of a Judge in civil cases is nowhere laid down so distinctly in this respect; and there may be some doubt as to whether, and, if at all, to what extent, a Judge ought to interfere where no objection is raised by the parties. When the manner in which cases are prepared for trial in the majority of the Courts of original jurisdiction in the Mufassil is considered, and when it is reflected that few of the present practitioners in the Lower Courts have any idea of what is or what is not relevant, it will be apparent that, if the Courts themselves be passive in this respect, the utility of the Code of Evidence will be seriously impaired. Under the old law, and almost as it were from the necessity of the thing, it was indicated on more than one occasion that the Courts had an active duty to perform in respect of the admission and rejection of evidence, and this, wholly irrespective of objections emanating or rather failing to emanate from the parties or their pleaders. The Calcutta High Court laid down the following rule on one point connected with the subject:—"It will be the duty of the Judge to ascertain, by a few questions put to each witness at the proper time, whether he is speaking of matters within his own knowledge, or merely of those which he has heard from others; and, if the former, what are his means of knowledge."[1] In the case of *The Queen* v. *Petamber Sirdar and others* (7 W. R. Crim. Rul. 25), Markby, J. said:—"The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court." This no doubt was a criminal case, but the general direction above first quoted was addressed to all Courts, civil and criminal. With respect to the reception of documentary evidence, the same High Court, commenting[2] upon the laxity of practice prevailing in the Mufassil Courts on this head as "being productive of most serious inconvenience, and evincing in many cases total disregard of the wholesome provisions of the law," directed the attention of the Lower Courts to those provisions, and amongst others to section 129 of the old (to which corresponds section 140 of the present) Code of Civil Procedure, which enacted that all exhibits produced by the parties should be

[1] Circular No. 31 (Civil Side), dated 13th October, 1863, page 63 of Vol. I of the Author's "*General Rules and Circular Orders.*"

[2] See Circular No. 9 (Civil Side), dated 26th February, 1867, page 189, *idem.*

received and inspected by the Court; but it should be competent to the Court, after inspection, to reject any exhibit *which it might consider irrelevant or otherwise inadmissible*, recording the grounds of such rejection. "This," says the circular referred to, "means that the Court is to take care that parties are not allowed to put in exhibits which are (1) irrelevant or (2) inadmissible." Turning now to the Evidence Act, it will be found that many of its provisions tend to impose an imperative duty upon the Court. The *proviso* to the above section (165) distinctly declares that the Judge *shall* not dispense with primary evidence of any document except in the cases excepted in the Act. Section 64, *ante*, enacts that "documents *must* be proved by primary evidence except in the cases hereinafter mentioned." So section 60, *ante*, enacts that oral evidence *must*, in all cases whatever, be direct. Then section 5, *ante*, enacts that evidence may be given of relevant facts *and of no others*. Having regard to the language of these sections and of other portions of the Act, it will be clear that it was the intention of the Legislature that a Civil Court should, irrespective of objections made by parties, compel observance of the provisions of the law. But what if the Court neglect its duty in this respect? In the case of an appeal, are parties, themselves ignorant of the provisions of the law, and unable to procure the services of competent advisers because none such exist on the spot, to suffer for the *laches* of the Court? It may be said that there is no good reason why this particular case should form an exception to the general rule—*Ignorantia juris non excusat*. There is also a distinction between cases in which evidence wholly irrelevant has been erroneously admitted, and those cases in which a relevant fact has been improperly allowed to be proved in a manner different from that which the law requires. The whole question will be found further considered in the Note to section 167, *post*.]

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for rejection or improper reception of evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it

This §167 applies also to second appeals F.B. Sp. a. 98 of 1866 decided 29/8

shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[This is *verbatim* Section 57 of the old Act, II of 1855: and the rule has been adopted from the practice of the Courts in England. "Where evidence," says Mr. Lush, "has been offered by one party at the trial, and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite party, a new trial, as a general rule, may be claimed on the ground that, in so rejecting or admitting the evidence, the Judge did not rule according to law. But still the Courts have not been in the habit of granting a new trial *if, with the evidence rejected, a verdict for the party offering it would be clearly against the weight of evidence; or if, without the evidence received, there be enough to warrant the verdict;* yet, unless in a very clear case, the Courts will not thus determine the effect of the improperly rejected evidence, but will direct a new trial."[1] In *R.* v. *Grant*[2] it was laid down that it is only where the evidence in question is deemed by the Court to have been admissible *for the purpose for which it was tendered at the trial*, that its rejection forms a sufficient ground for a new trial: and that a new trial will not be granted in order that evidence may be given for a purpose other than that for which it was offered, for in such case the fault lay with the party and not with the Judge. Where the fault was that of the Judge, it is evident that it would be a fruitless protraction of litigation to grant a new trial in those cases in which it is clear that the Judge's error could have had no possible effect upon the result.[3] It will, however, be well to bear in

Rule of English Law.

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[1] *Stephen's Lush's Common Law Practice*, 2nd edition, p. 481, quoting Alderson, B. in *Hughes* v. *Hughes*, 15 Meeson and Welsby's Rep. 701. See also the other cases there cited.

[2] 5 Barnewall and Adolphus's Rep. 1081.

[3] See *Wright* v. *Doe d. Tatham*, 7 Adolphus and Ellis's Rep. 330. Compare 13 and 14 Vict. Cap. 36, section 45, which enacts for Scotland that "a bill of exceptions shall not be allowed in any cause before the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have

mind that the English cases were decided under a system different from that which prevails in India, differing more especially in this, that in England the facts are found by a jury, while in India the Judge is judge both of fact and law. Under the former system a new trial might well be granted when the effect of a particular piece of evidence upon a jury might be the subject of reasonable doubt; while under the latter the Judge can himself say what the effect would be upon his own mind. In the case of *Mohur Singh* v. *Ghariba* (4 B. L. R. 499) the following observations were made by the Privy Council:—"It seems to their Lordships that, giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country before which, on a motion for a new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in that case are not judges of fact, and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. *But it is the duty of their Lordships, who are judges of the fact, in such a case as this, to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees.*" See also *Lalla Banshidar* v. *The Government of Bengal* (9 B. L. R. 371).

Duty of Appellate Court when evidence has been improperly admitted by Court of first instance.

In these words of their Lordships of the Privy Council is indicated very clearly what is the duty of a Court sitting in *regular* appeal, and therefore competent to deal with both facts and law, when evidence has been improperly admitted by the Court of first instance. *It should throw aside the evidence which ought not to have been admitted, and then consider whether there still remains sufficient evidence to support the decree.*[1] Where the evidence which is

affected the result at which the jury by their verdict have arrived." The rules of Court made under the Judicature Act in England provide that a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action (Order XXXIX, Rule 3).

[1] Compare section 565 of the Code of Civil Procedure, which enacts that when the evidence upon the record is sufficient to enable the Appellate Court to pro-

to be so thrown aside is wholly irrelevant, the case is sufficiently clear. The decree can be supported upon relevant evidence only: and if, after all that is irrelevant has been thrown aside, there does not remain enough that is relevant to support it, the decision must be reversed. The party who is thus defeated may say that if he had known that the evidence given would have been insufficient for the purpose, he could have produced other evidence that would have been sufficient. The answer to this objection is to be found in the following observations of their Lordships of the Privy Council in the case of *Maharaja Kunwar Nitrasar Singh* v. *Babu Nand Lall and others* (8 Moo. Ind. Ap. 199):—"The learned counsel for the appellant have not strongly contended that the proper order to be made on this appeal is one remanding the case for retrial. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favor by the Principal Sadr Amin affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sadr Court was right in treating the cause as ripe for final decision. The appellant had, at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at his instance or with his consent. *And the suspicion, however probable, of the Judge that a party, who has failed to prove his case, may be more successful on a second and fuller investigation is no sufficient ground for directing a new trial.*"

Relevant fact improperly proved.

But there is another class of cases, namely those in which a fact relevant in itself has been erroneously allowed to be proved in a manner not permitted by the law, as for example, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for. The rule in England is that, unless the opposite party objected to this evidence at the time that it was offered, he cannot object afterwards: and in accordance with this rule, it has been held more than once by the Calcutta High Court, that it is not competent to an Appellate Court sitting in regular

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nounce judgment, the Appellate Court shall, after re-settling the issues, if necessary, finally determine the case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the appellate Court proceeds.

appeal to reject the *copy* of a document, to the admission of which by the Lower Court no objection was made by any of the parties, although the original was not produced or its non-production not accounted for. In dealing with such a case under the new Evidence Act, it will, as already observed, be necessary to consider the effect of "must" in section 64, *ante*, and of the second proviso to section 165, *ante*, which enacts that a Judge *shall not* dispense with primary evidence of any document, except in the cases excepted by the Act. The effect of a compulsory Registration Law has been considered, *ante*, page 423 and following pages. It remains to make a few remarks about the Stamp Act.

Unstamped or insufficiently stamped documents.

Where documents required by law to be stamped were received by the Court of first instance without a stamp or without a sufficient stamp, it has been held that it was not competent to an Appellate Court to reject them (*Lalji Singh* v. *Syad Akram Ser and others*, 3 B. L. R. 235—unstamped receipts), or on this account to reverse the decision of the Lower Court[1] (*Mark Ridded Currie* v. *S. V. Mutu Ramen Chetty*, 3 B. L. R. 130). Both these cases proceeded on the ground that the error of receiving a document insufficiently stamped or without a stamp, does not affect the merits of the case or the jurisdiction of the Court,[2] although it may affect the Government revenue. These cases were decided under the old Stamp Act, X of 1862: and are somewhat remarkable, having regard to the imperative provisions of section 14[3] of that Act, which directed that no instrument charge-

[1] Compare section 31 of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125) which enacts that "no new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp." This section however assumes that the question of the stamp has been raised and decided.

[2] Having advertence to section 350 of the old Code of Civil Procedure, which enacted that "the judgment may be for confirming or reversing or modifying the decree of the Lower Court. But no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court, on account of any error, defect, or irregularity either in the decision or in any interlocutory order passed in the suit *not affecting the merits of the case or the jurisdiction of the Court.*" See sections 577 and 578 of the present Code. In *Haran Chandra Bhuri* v. *Rasik Chandra Neogi* (20 W. R. 63) it was said that when a lost deed is shown not to have had a stamp, it may be right for a Court to require, before admitting secondary evidence, that the same penalty be paid as would have been paid if the unstamped deed itself were produced: but if the Court without doing this, allows secondary evidence to be given of the contents of the document, this is not an error which affects the merits of the decision and which a person can take advantage of in special appeal.

[3] Section 18 of the new Act, XVIII of 1869, is similar.

able with stamp-duty shall be received in any Court of Justice as creating, transferring, or extinguishing any right or obligation, or as evidence in any civil proceeding, or *shall be acted upon* in any such Court or by any public officer, *unless duly stamped* as required by the Act. This language is not less imperative than that of the Registration Act (see section 49 thereof, *ante*, page 425) upon which a very different construction has been put. But see *Tetai Abom* v. *Gagai Gura Chawa*, (3 B. L. R. Appen. 30), in which, however, the document had been objected to in the Court of first instance: and the remarks of Couch, C. J. in *Ankar Chandra Rai Chaudhri* v. *Madhab Chandra Ghose*, *&c.* (21 W. R. 1).

Evidence admitted at an improper stage of case.

Evidence cannot be said to have been improperly admitted merely because it was admitted at an improper stage of the case, unless indeed the other party have been prejudiced by this course (*Doe d. Nicholl* v. *Bower*, 16 Adolphus and Ellis's Rep. 805: *Goshain Tota Ram* v. *Raja Rikmani Ballab*, 13 Moo. Ind. App. 83). It would seem that, if an Appellate Court receive additional evidence without recording the reasons for the admission thereof, as required by section 355 of the old (section 568 of the new) Code of Civil Procedure (see *post*, pp. 654-655), such evidence so received is to be regarded as improperly admitted (*Maharaja Jagadindra Banwari Gabind Bahadúr* v. *Bhabatarini Dasi*, 5 B. L. R. App. 54).

Improper rejection of Evidence.

Turning now to the case in which evidence properly receivable has been offered and improperly rejected, the rule here is, that the improper rejection is not to be a ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, if the rejected evidence had been received, it ought not to have varied the decision. If the Appellate Court is of opinion that the rejected evidence, if received, ought to have varied the decision, it does not follow that such Court should in every case proceed at once to reverse the decision of the lower Court. It is competent for the superior Court, and in most cases it would be proper, to proceed in the manner provided for in section 568 of the Code of Civil Procedure, which is as follows:—

Production of additional evidence in Appellate Court.

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if (*a*) the Court against whose decree the appeal is made refused to admit evidence which ought to have been admitted, or (*b*) the Appellate Court requires any document to be produced or any

witness to be examined to enable it to pronounce judgment or for any other substantial cause, the Appellate Court may allow such evidence to be produced or document to be received, or witness to be examined. Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission."

The above section of the Indian Evidence Act has been so far considered in connection with Courts of Appeal, to which the words "reversal of any decision" indicate its applicability, inasmuch as Courts of Appeal have power to reverse the decisions in respect of which appeals are preferred. With regard to a *new trial* it is to be observed that the Code of Civil Procedure does not provide for a new trial in Civil cases. Sections 623 to 630 of this Code provide for a *review of judgment:* and section 630 enacts that, when an application for a review of judgment is granted, the Court may at once *rehear* the case, or make such order in regard to the *rehearing* as it thinks fit. Whether by this "rehearing" is intended a new trial—a trial *de novo*—including a re-examination of witnesses, or merely a re-arguing and re-consideration of the case, after receiving the additional evidence, the discovery of which since the former trial was the ground of admitting the review —has never been decided, so far as I am aware. It may be observed that the terms "review" and "re-hearing" are borrowed from the practice of the Courts of Chancery in England, and this might seem to indicate that the second of the courses just mentioned is what was contemplated.[1] A *new trial* is provided for by section 21 of the Mufassil Small Cause Court Act, XI of 1865, and by section 43 of Act IX of 1850 applicable to the Presidency Towns. In Criminal cases an appel-

[1] On the subject of reviews the following cases may be usefully referred to:— *Amrao Takur* v. *Gokal Mandal and another*, 8 B. L. R. App. 34 (review not to be granted without proof of the truth of the ground on which it is asked): *In the matter of the petition of Chintamani Pal and others* (Full Bench), 6 B. L. R. 126 (raising of new point which had not been discussed at the original hearing): *In the matter of the petition of Jadunath Mukherji*, 6 B. L. R. 333 (cannot be admitted by Lower Appellate Court after a special appeal): *Bihari Lall Nandi and others* v. *Srimati Trailakha Mayi Barmani*, 3 B. L. R. 346 (grounds for admitting): *Maharajah Moheshur Singh* v. *The Bengal Government*, 7 Moo. Ind. App. 304 (distinction between *review* and *appeal*): *Sheikh Golam Hosen* v. *Okhai Kumar Ghose*, 3 W. R. Act X Rul. 169 (Judge improperly granting review of predecessor's judgment): *Bheirub Chandra Surmah Chaudhri, &c.* v. *Madhab Ram Surmah, &c.* 2 B. L. R. 423; S. C. 20 W. R. 84 (appeal allowed when no enquiry or proof that new evidence could not have been produced at original trial): *Burra Fakir Das Bera* v. *Fakir Das Bera*, 20 W. R. 180 (power to grant, strictly limited by the provisions of the Code).

late Court may, if it see fit, order the appellant to be *retried* (section 280 of the Code of Criminal Procedure as amended by section 28 of Act XI of 1874). If the High Court in the exercise of its powers of revision considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a *new trial* before a competent Court (section 297). Section 167 of the Evidence Act applies to criminal as well as to civil cases, and where a point of law as to the admissibility of rejected evidence is reserved for the consideration of the High Court under Clause 25 of the Letters Patent and section 101 of the High Courts' Criminal Procedure Act, X of 1875, such Court has power to review the whole case and determine whether, if the rejected evidence had been admitted, the result ought still to have been the same (*Imperatrix* v. *Pitamber Jina*, I. L. R. 2 Bom. 61: *Regina* v. *Navroji Dadabhai*, 9 Bom. H. C. Rep. 359: *The Queen* v. *Harribole Chandra Ghose*, I. L. R. 1 Calc. 207).

Duty of Appellate Courts.

In connection with the subject of the duty of Appellate Courts, it will be useful to notice a rule established by a long train of decisions of the Judicial Committee of the Privy Council, namely, that their Lordships will not disturb the concurrent decision of two Courts in India upon a question of fact which appears to have been *proved and diligently investigated in the Courts below*, unless it very clearly appears that there has been some miscarriage of justice or some mistrial, or that the conclusion arrived at is very plainly erroneous—*Chandra Mani Debi Chaudhrain* v. *Manmohini Debya*, 8 Moo. Ind. Ap 489; *Ghulam Múrtúzah Khan Bahadúr* v. *The Government*, 9 Moo. Ind. Ap. 478 ("It is not the course of the Committee to disturb the finding of the Courts below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage, either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination and of inspecting the original documents"): *Naragunty Latchmidavamah* v. *Vengama Naidu*, 9 Moo. Ind. Ap. 87 (It is not the habit of their Lordships, unless in very extraodinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have; and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment; but in this case we think that the Courts could have come properly to no other conclusion than that at

which they arrived"): *Massamat Jariatula Batul* v. *Massamat Hoseini Begum*, 11 Moo. Ind. Ap. 208: *Mithan Bibi* v. *Bashir Khan*, 11 Moo. Ind. Ap. 216: *Tarini Charan Banerji* v. *Maitland*, 11 Moo. Ind. Ap. 338: *Goshain Tota Ram* v. *Rajah Rikmani Ballab*, 13 Moo. Ind. Ap. 82: *Gobind Sandari Debi* v. *Jagadamba Debi*, 6 B. L. R. 171: *Lalji Sahu* v. *The Collector of Tirhut*, 6 B. L. R. 652: *Maharaj Kumar Babu Ganeshwar Singh* v. *Durga Dutt and others*, 7 B. L. R. 652 ("But their Lordships are clearly of opinion that when the question is one simply of fact, and when, above all things, that question of fact is a question of fact as to *boundaries*, where the local knowledge of local Judges and the observation of the local witnesses are all important, they would be departing from what has been the practice of this tribunal, if they were to act in opposition to the well-considered judgment of the two Courts from whom the appeal comes. It is admitted, and could not be otherwise than admitted, that there is evidence, which, if believed, would have justified those judgments. Their Lordships are of opinion that the Courts below were the best tribunal for deciding the question whether the evidence was credible or not, and they would be entirely unwilling to disturb their judgments"): *Lalla Banshidar* v. *The Government of Bengal*, 9 B. L. R. 369: *Forbes* v. *Mir Mahomed Hosein*, 12 B. L. R. 218; S. C. 20 W. R. 44: *Jainarain Giri* v. *Sib Persad Giri*, *&c.* 19 W. R. 275: *Koer Poresh Narain Rai* v. *Robert Watson & Co.*, *&c.* 23 W. R. 451). The following cases were held not to be within the rule:—*Rangama* v. *Atchama*, 4 Moo. Ind. Ap. 1 (disputed question of adoption): *Haradhan Mukherji* v. *Mathuranath Mukherji*, *&c.* 4 Moo. Ind. Ap. 414 (disputed question of adoption): *Madhu Súdhan Sandyal* v. *Sarúp Chandra Sirkar Chaudhri*, 4 Moo. Ind. Ap. 433 ("Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in India generally possess of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions: but *does not, and ought not, to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case*"): *Tayammaul* v. *Sasha Challa Naiker*, 10 Moo. Ind. Ap. 436 (decision founded upon the testimony of a single witness selected by the first Court—and no careful weighing of the evidence on both sides): *Raja Bardakant Rai* v. *Babu Chandra Kumar Rai*, 12 Moo. Ind. Ap. 153 (facts as found not in truth decisive of the real issue between the parties): *Raja Saheb Perhlad Sein* v. *Durga Persad Tiwari*, 12 Moo. Ind. Ap. 286, 322, 331 (remand for new trial on additional evidence): *Mulci Syad Azhar Ali* v. *Massamat Bibi Altaf*

Fatima and others, 13 Moo. Ind. Ap. 243 ("In coming to the conclusion which their Lordships have come to in this case, they feel that they are not departing from the wholesome rule—that, unless they are clearly satisfied that the finding of two concurrent Courts in India upon a question of fact was wrong, such finding will not be disturbed here. For, if the judgments in the respondents' favour are carefully examined, it will appear either that there has been no finding at all of the facts which it was necessary to find, or that those facts have been found in favour of the appellant"): *Charles Seton Guthrie* v. *Abul Mazaffar*, 7 B. L. R. 640 (High Court had affirmed judgment of Lower Court on facts without giving reasons, merely stating that it saw no reason to differ from the finding of the Zillah Judge): *Mussamat Bibi Bachan* v. *Sheikh Hamid Hossein*, 10 B. L. R. 52 (no explicit finding upon the point in question): *Hay* v. *Gordon*, 10 B. L. R. 311 (divorce case—scarcely two separate judgments as decision of first Court operative only if confirmed by High Court—evidence wrongly admitted): *Lekraj Rai v. Mahtab Chand*, 14 Moo. Ind. Ap. 399 (burden of proof placed on wrong party and decision of both Courts in India influenced by the error): *Pauliem Vallu Chetty* v. *Pauliem Suryah Chetty*, L. R. 4 Ind. Ap. 109; S. C. I. L. R. 1 Mad. 252 (question of fact a good deal mixed up with law).

In the case of *Tayabannissa Bibi* v. *Kuwar Sham Kishore Rai* (3 B. L. R. 627) it was said, with reference no doubt to some of the above cases, that it was the duty of an Appellate Court, laid down by the Privy Council, not to interfere with the judgment of the first Court until it was perfectly satisfied in its own mind that the conclusion arrived at by the first Court was erroneous: and that, if there was any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed that the judgment of the lower Court is right until the contrary be shown. In *Khajah Gauhar Ali Khan* v. *Khajah Ahmed Khan* (20 W. R. 215) the Lords of the Privy Council said:—"The Judge of the Civil Court of Patna heard these witnesses. They were all examined in his presence, and it is impossible not to consider that the Judge, who hears the witnesses, is really the best person and very often the only person, who can judge of the credit to be given to them, because he not only hears what they have to say, but he observes the manner in which they say it. He is also much more conversant with the general position of the persons who come before him than any Court of appeal can be."

Some other cases.

In the case of *Goshain Tota Ram* v. *Rajah Rikmani Ballab* (13 Moo. Ind. Ap. 83) their Lordships of the Privy Council said that they had not been in the habit of determining appeals upon the mere fact that certain

evidence may have been improperly admitted—that it had always been the rule of the Committee to do substantial justice between the parties, to take the record as it is sent over, and to see whether there is sufficient evidence on the whole record to justify the conclusion to which the Court below came. In the case of *The Bank of Hindústan, China, and Japan* v. *The Eastern Financial Association* (13 Moo. Ind. Ap. 34) their Lordships, speaking of the exercise by the Courts in India of their discretion in a matter in which they had a discretion by law, said:—"In accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in India, where two Courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with very great caution."

The Calcutta High Court, sitting in special appeal,[1] have remanded cases to be tried over again by the lower Appellate Court:—where important evidence had not been carefully considered by such Court (*Mussamat Digambarí Dasí and others* v. *Kissen Dhar Nandí and others*, 1 Jur. N. S. 35):—where the judgment of the lower Appellate Court was based on part of the evidence only (*Shandhaban Mohunt* v. *Sarat Chandra Rai*, 23 W. R. 160: *Abdul Rahman, &c.* v. *Sofy Mikhayesh Saheba*, 24 W. R. 293):—where the importance of a particular piece of evidence had been much underrated (*Sarosatí Dasí* v. *Ambika Nand Biswas, &c.* 24 W. R. 192):—where witnesses were discredited for general reasons not affecting the credit of any individual deponent (*Sheo Parshan Panday, &c.* v. *Bran Panday, &c.* 24 W. R. 251):—where the Judge of the lower Appellate Court had not recorded

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[1] Section 372 of the old Code of Civil Procedure enacted that "unless otherwise provided by any law for the time being in force, a *special appeal* shall lie to the Sadr Court, from all decisions passed in regular appeal by the Courts subordinate to the Sadr Court, *on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground.*" For an account of the origin, &c. of "special appeals," see pages 178-181 of the Introduction to the Author's edition of the Bengal Regulations. The term "special appeal" is not used in the present Code, which speaks of "second appeals" and "appeals from appellate decrees"—see sections 584—586.

Judgment founded upon mistaken statement of evidence reversed. P.T. 74 p
Sub-Judge held evidence sufficient w/o did not examine [illegible]; Judge reversed holding [illegible] not sufficient: Highest reversed decree. P.T. 74 p 9
Claim misunderstood: Highest reversed decree. P.T. 74 p 119.
Finding without reasons reversed. P.T. 77 p 38, P.T. 84 p 236, 2 R 8.
2 R 7 all 649 F.B.

his judgment in the manner required by law, *viz.* section 359 of the old (section 203 of the new) Code of Civil Procedure, which requires that the judgment contain the point or points for determination, the decision thereupon, and the reasons for such decision (*Tatur Khawas* v. *Jaganath Persad*, 7 B. L. R. Appen. 14; and see *Krísto Gobind Kur, &c.* v. *Ganga Persad Sarma*, 23 W. R. 266):—where the lower Appellate Court had otherwise dealt with the evidence in an improper manner (*Mussamat Rúp Naraini Kúwar, &c.* v. *Ressal Tewari, &c.* 24 W. R. 119; *Chand Mani Dasi* v. *Obhai Charan Mal, &c.* 24 W. R. 289: *Amiran* v. *Cherág Ali, &c.* 24 W. R. 343: *Ramdas Saha* v. *Manmahini Dasi*, 7 B. L. R. Appen. 4: *Basti Sahu, &c.* v. *Jeo Narain Singh, &c.* 24 W. R. 338: *Hunsa Koer* v. *Seo Gobind Raút*, 24 W. R. 431: *Gani Biswas* v. *Srígopal Paul Chaudhri*, 8 W. R. Civ. Rul. 395):—where a fact had been found by the lower Court upon evidence, part of which was inadmissible (*Gúrúdas Dey* v. *Sambhúnath Chakravartti*, 3 B. L. R. 259):—where the judgment showed on the face of it want of due consideration of the evidence and the introduction of extraneous matter (*Suraj Kanth Acharjya* v. *Khudi Narain Manna, &c.* 22 W. R. 9): where the judgment of the lower Court misstated the most important facts (*Purna Chandra Chatterji* v. *Chandra Kumar Rai, &c.* 24 W. R. 171). It was held to be an error in law within the meaning of section 372 of the old Code of Civil Procedure when the lower Court found on no evidence or on what was not legal evidence (*Ram Sudhan Sirkar* v. *Kistobag Bag*, Marsh. Rep. 322)—when secondary evidence was improperly admitted in the place of primary (*Chandra Kant Ghose and another* v. *Saudamani Debi and others*, 9 W. R. Civ. Rul. 517)—when the lower Court dealt improperly with presumptions of law (*Rani Surnamayi* v. *Luchmipat Dugar and others*, 9 W. R. Civ. Rul. 338)—or with presumptions of fact (*Nilatachi* v. *Verikatachala Mudali*, 1 Mad. H. C. Rep. 131).[1]

The following sections of the Code of Criminal Procedure, Act X of 1872, define the duties of Appellate Courts exercising criminal jurisdiction:—

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[1] See also the following cases:—*Gopal Khundi Rao* v. *Deoki Nandan*, 6 N. W. P. Rep. 172 (discretion properly or improperly exercised by lower Court): *Shib Sahai Singh, &c.* v. *Narsingh Lal, &c.* 22 W. R. 352 (case may not be decided in special appeal upon a point not raised, tried or considered below): *Tara Prosonno Mazimdar* v. *Bissonath Sirkar*, 23 W. R. 144 (cannot be contended in special appeal, which of the two lower Courts is right, when they differ as to facts): *Himmat Ali Khadún, &c.* v. *Niyamatúla Khadim, &c.* 23 W. R. 250 (construction of depositions of witnesses not a question of law).

"283. No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial, or *on account of the improper admission or rejection of any evidence*, or by any misdirection in any charge to a jury, *unless such error or defect has occasioned a failure of justice*, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner in his defence.[1]

Finding or sentence of Criminal Court when reversible by reason of error or defect in charge or proceedings.

No irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence or order made or passed in a trial properly held.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence, which, in the judgment of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence.

Appellate Court may reduce punishment.

284. When any Court has convicted a person of an offence not triable[2] by such Court, the Appellate Court shall annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction."

Procedure in case of conviction by Court not having jurisdiction.

In connection with this subject it may be observed that Judges and Magistrates are precluded from trying cases in which they have an interest; and if they try such cases, their decisions will be reversed. Where the interest is private and personal, the prohibition is absolute. When the interest arises merely from directing a prosecution in an official or judicial capacity, occasional exceptions have been allowed, but the tendency is to uphold the rule. In *The Queen v. Nadichand Poddar* (24 W. R. Cr. Rul. 1) it was observed that the Magistrate of a district should not have tried a case, in which he, as Collector, had directed a prosecution for a violation of the Stamp Act. When the Magistrate of a district had initiated the prosecution of a person who was tried and convicted by a Subordinate Magistrate, from whose sentence an appeal lay to the Magistrate of the district, the

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[1] See the following cases, decided upon the corresponding section of the old Act:—*The Queen* v. *Mahima Chandra Das*, 6 B. L. R. Appen. 112: *The Queen* v. *Elahi Baksh*, 5 W. R. Crim. Rul. 88.

[2] See *Reg.* v. *Tukárám Rágho*, 12 Bom. H. C. Rep. 234.

High Court transferred the hearing of the appeal to the Sessions Judge, considering it not altogether seemly that it should be heard by the District Magistrate (*Ramzan Ali* v. *Durpo Kamilla*, *&c.* 24 W. R. Cr. Rul. 58). See also section 473 of the Code of Criminal Procedure. When a Deputy Commissioner in his executive capacity as Court of Wards instituted a suit on behalf of a minor, and in his capacity of Civil Judge tried it, the High Court considered this improper (*Raja Bikromajit Mullo Ogalsundo Deb* v. *Court of Wards*, *&c.* 21 W. R. 312). Section 25 of "The Bengal Civil Courts' Act," VI of 1871, enacts that no Múnsif, Subordinate Judge, Additional Judge, or District Judge shall try any suit in which he is a party or personally interested, or shall adjudicate upon any proceeeding connected with, or arising out of, such suit; and no Subordinate Judge, Additional Judge, or District Judge shall try any appeal against a decree or order passed by himself in another capacity. Similar provisions are contained in section 17 of "The Madras Civil Courts' Act," III of 1873. "The Bombay Civil Courts' Act," XIV of 1869, is silent on the subject. A judgment, decree, or order made in violation of the above provisions would be without jurisdiction, and therefore null and void.[1]

Judge or Magistrate may not try case in which he has an interest.

[1] As to a Judge having no jurisdiction to try a case in which he has an interest, see *Calcutta Steam Tug Co.* v. *Hag Hoseni Ibrahim Bin Jahur*, Bourke's Rep. O. C. 273; and *Dimes* v. *Proprietors of Grand Junction Canal*, 3 H. L. Cases 759, in which the House of Lords reversed a decision of Lord Chancellor Cottenham, because he was a shareholder in the Company to the extent of a few thousand pounds.

SCHEDULE.

Number and year.	Title.	Extent of repeal.
Stat. 26 Geo. III c. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled, An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight, so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic. c. 99.	To amend the Law of Evidence	Section eleven and so much of section nineteen as relates to British India.
Act XV of 1852	To amend the Law of Evidence	So much as has not been heretofore repealed.[1]

[1] Section 12 was saved by section 12 of the amending Act, XVIII of 1872; but was repealed by "The Oath's Act," X of 1873.

SCHEDULE.—(*continued.*)

Number and year.	Title.	Extent of repeal.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II of 1855	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868	The General Clauses Act, 1868	Sections seven and eight.

ACT XVIII OF 1872.

An Act to amend the Indian Evidence Act, 1872.*

Preamble.

WHEREAS it is expedient to amend the Indian Evidence Act, 1872; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian Evidence Act Amendment Act;"

Commencement.

And it shall come into force on the passing thereof.

Amendment of Act I of 1872, section 32, clauses 5 and 6.

2. In section thirty-two of the Indian Evidence Act, 1872, clauses (5) and (6), after the word "relationship," the words "by blood, marriage or adoption" shall be inserted.

* The amendments made by this Act have been introduced into the text of the Evidence Act as printed in the body of this work.

NOTE—The edition of Act No. I of 1872 above referred to, is that in royal octavo.

3. In section forty-one of the same Act, lines seventeen, twenty, and twenty-three, after the word "judgment," the words "order or decree" shall be inserted.

Amendment of section 41.

4. In section forty-five of the same Act, line five, after the word "art," the words "or in questions as to identity of handwriting" shall be inserted.

Amendment of section 45.

5. In section fifty-seven of the same Act, paragraph (13), after the word "road," the words "on land or at sea" shall be inserted.

Amendment of section 57.

6. In section sixty-six of the same Act, line five, after the word "is," the words "or to his attorney or pleader" shall be inserted.

Amendment of section 66.

7. In section ninety-one of the same Act, exception (2), for the words "under the Indian Succession Act," the words "admitted to probate in British India" shall be substituted.

Amendment of section 91.

8. *Repealed.*

9. In section one hundred and eight of the same Act, line one, for the word "when" (1) the words "Provided that when" shall be substituted; and in the last line, for the word "on," the words "shifted to" shall be substituted.

Amendment of section 108.

10. In section one hundred and twenty-six of the same Act, line twenty-two, and in section one hundred and twenty-eight of the same Act, line six, after the word "barrister," the word "pleader" shall be inserted.

Amendment of sections 126 and 128.

In section one hundred and twenty-six of the same Act, line fifteen, for the word "criminal," the word "illegal" shall be substituted.

Amendment of section 155.

11. In section one hundred and fifty-five of the same Act, paragraph (2), for the word "had," the word "accepted" shall be substituted.

Saving of Act XV of 1852, section 12.

12. Nothing in the Indian Evidence Act, 1872, shall be deemed to affect Act No. XV of 1852 (*to amend the Law of Evidence*), section twelve

APPENDIX.

ZEMINDARÍ ACCOUNTS.

Jamá-Wásil-Bákí papers form but a portion of a regular system of *zemindárí* accounts in use in Bengal, where, wrote Warren Hastings, "the accounts of revenue are kept with a regularity and precision unknown in Europe." In order to estimate the real value of these papers in evidence, it is absolutely necessary to have some idea of the system to which they belong. The following sketch of this system taken in part from a book* published many years ago and now out of print, may be useful in giving a general idea of it, though it cannot be thoroughly understood without specimens of the accounts themselves, which it would take up too much space to insert in this place.

* *Zumeendaree Accounts* by D. Carmichael-Smith, Esq., of the Bengal Civil Service. Thacker & Co., 1839.

Chitá.

The *chitthá* or *chitá*, commonly written *chittah*, is an account of all the lands in a village divided into *dágs* or parcels which are numbered in a regular series. It contains the quantity of land in each *dág* or parcel, the length and breadth of the parcel, its boundaries, the species of cultivation, and the name of the raiyat to whom it belongs. The *chitá* is compiled from actual measurement. Measurements were formerly made every ten or twenty years and are now regulated by express provisions contained in the Rent Laws. The measurement is made in the presence of all the raiyats or cultivators, and what is entered in the *chitá* is generally what those interested admit at the time to be correct. It may be otherwise when the relations between *zemindar* and raiyats are not amicable, but a *chitá* made when there is no dispute going on is valuable as an admission by the parties concerned of the state of things at a time when there was no controversy; and, in the case of subsequent disputes amongst the raiyats or between neighbouring landholders, the *chitás* are invariably appealed to. The measurement is usually commenced at some well-known place in the village, such as a tank, an old pipul tree, &c., and the first *dág* is said to be north, south, east, or west of this, the three other boundaries being also given. The second *dág* is contiguous to and north, south, east, or west, or a little to the north, south, east, or west of the first—and the rest follow in order.

The *chitás* of the detailed (*khasrah*) measurement made by Government[1] are prepared to show: 1—The number of the plot or parcel: 2—the number of the estate on the Government *taujih* or rent-roll: 3—the name of the estate: 4—the name of the owner of the estate: 5—the name of the occupant raiyat: 6—position of each plot with relation to the preceding plot: 7—measure of each length taken: 8—mean length and direction: 9—length of each breadth taken: 10—mean breadth and direction: 11—area of land: 12—description of land: 13—sort of produce: 14—remarks—(See *Rules for the Guidance of Officers engaged in the administration of the Revenue Department in the Lower Provinces of Bengal*, Chap. XXIII, s. iii. para. 8).

Goshwára.

The *goshwára* is an abstract of the *chitás*, showing the total quantity of land and its distribution, as waste, cultivated, fallow, grazing-land, road-land, land occupied by houses, by gardens, by tanks, &c. It contains a separate page for *raiyatí* (rent of which is paid in money), *khamár* (rent of which is paid in kind), *khúd-kasht* (held by cultivators residing in the village, generally hereditary cultivators, literally 'sowing one's own ground') *paikasht* (held by non-resident cultivators, literally 'sowing land near or adjacent'), *thiká* (cultivated by hire or contract), *chakarán* (appropriated to the maintenance of the servants of the village establishment), *deotar* (devatra, rent-free granted for the support of idols or temples), *brahmottara* (land granted to Brahmins), *fakirána* (appropriated to Mohammadan religious mendicants), and other kinds of land. Where there are not more than one *chitá* for a village or where the *chitá* does not contain a large number of *dágs*, the *goshwára* is sometimes dispensed with.

Cuttean.

The *cuttean* (properly *khatáúni*) is a sort of ledger in which is entered the name of each raiyat, the quantity of land held by him in each *mahal* (*i. e. khud-kasht*, *paikasht*, *khamár* mahal, &c. as it may be), in what *chitá* contained, the number of the *dág* and the species of cultivation. In case of disputes between the cultivators a reference to this account

[1] At page 639 and following pages of the *Supplement to the Calcutta Gazette of the 4th December*, 1872, will be found a "Memorandum on the Khasrah Survey of Bengal," which shows that even the Government Survey is not always to be depended upon. Occasionally, when the Amins came to close their *circuits*, they could not find space on the map for all the fields, as the whole of it had already been filled up, and so the excess fields were shown on the margin and outside the map itself? Occasionally, also, the centre space was more than sufficient for all the fields measured, and *the surplus space was filled up with ideal fields*, "*ashmani dágs*," as they were called! And this was not discovered for many years after.

will show exactly how much land ought to be in the possession of each raiyat. Rent-free (lakheraj) land is also shown in the *cuttean*.

Ekwal. The *ekwal* (thought by Wilson to be a corruption of *akwal* = agreements) shows the entire quantity of the land in each individual cultivator's possession in each separate mahal, with a detail of the cultivation. The *jamabandí* is formed from this and the *cuttean*, the quantity, and description of land in each cultivator's possession being ascertained therefrom in order to the settling of the *jama* or rent. The *ekwal* further serves as a check upon the other portions of the system of accounts, as the general abstracts of this and of the *goshwára* ought to tally precisely.

Cuttean Tirij. The *cuttean tirij* (an abstract account compiled from other details) shows the total gross quantity of land in each cultivator's possession and the details of the cultivation. The difference between this and the *ekwal* is that the *ekwal* shows the whole quantity in each mahal in the page of the account allotted to such mahal, *khud-kasht*, *paikasht*, &c. but in the *cuttean tirij* these items are all collected and totalled under the name of the individual raiyat. *Lakkeraj* land is not included in the *cuttean tirij*.

Jamabandí. The *jamabandí* shows the quantity of land held by each cultivator, its different qualities (*i. e.*, whether it grows paddy, mustard, cotton, &c.), the rate of rent for each kind of land, the total rent for all the land of that particular kind in each cultivator's possession, and, lastly, the grand total for all the lands of every kind held by him. The *jamabandí* is valuable for showing the pargana or prevailing rate of rent for lands of each of the different kinds.

Taujíh. The *taujíh* (vulgarly *towjee*, "explaining," "calling attention") shows the total rent payable by each cultivator, the number of instalments in which it is payable, and the months in which these instalments are to be paid.

Talab-Bákí. In the *talab-bákí* (literally demand-balance) are shown on one side of the page the amount of rent due by each cultivator (including the balance (if any) due from former years and the amount payable for the year of account), and on the other side the sums paid during the year with the date of each payment. At the close of the year the balance is struck and carried on to the accounts of the following year. The accuracy of the *talab-bákí* may be tested by reference to the *siah* or day-book. The total balance must also correspond with the total balance of the *jama-wasil-baki*.

Kharcha-hisáb.

The *kharcha-hisáb* shows on one side of the page a detailed statement of the land as by *the ekwal* and *jama-bandí*, together with the total amount of rent payable for each kind of land. If any change in the quantity of land held by each cultivator have been made since drawing up the talab-bákí, it will here be entered under the head *khárij* (transferred *to* another cultivator), *dakhil* (transferred *from* another cultivator), *kami* (less) or *beshi* (more). On the other side of the page is entered the total demand of rent, the total sum collected after deducting *batta* (difference of exchange for coins of different currencies), &c. and, the latter being deducted from the former, the balance shows what is still due by each raiyat in each mahal.

Jamá-Wásil-Báki.

The *Jamá-Wásil-Báki* shows, distributed under each mahal, the total rent demandable from each raiyat for the current year, the balance of previous years, the amount collected during the year, and the balance due at the end thereof. Its form differs much in different districts. In some it includes an account of the land as well as of the rent; in others the rent only is given. It occasionally contains abstracts showing the number of raiyats present, the number absconded, the total quantity of rent collected and in arrear for each *mahal*, account of *batta*, *&c.* It also shows the account of *abwábs* or cesses: and, these being now prohibited by law, it is not uncommon to have two sets of *jamá-wásil-bákí* accounts, the one set showing the *abwábs*, for private use; the other set, in which they are omitted, for purposes of litigation and for showing to Government officials. The *jamá-wásil-bákí* is only made out at the end of the year, and the items shown in it are carried from the other accounts, it may be, by a muharrir or writer, who has no personal knowledge of the payments or other facts set forth by such items. This account is said to have been invented by *Udhmant Singh* of Nussipur in the District of Murshedabad in order to enable the Zemindars to represent the collections as they pleased to the Muhammadan Government.

Síáh.

The *Siáh* is the day-book of all the receipts and disbursements connected with the estate. It shows all sums received and disbursed, whether customary or incidental. It commences with the day on which the *Punyá* is performed, and closes with the current year. An original *siáh* has three distinguishing marks at the top of the first page, for, during the *púja* or religious ceremony, which always precedes the *Punyá*, the officiating Brahmin mixes a small quantity of red ochre (*sindhur*), some ghee (clarified

butter), some turmeric (*haldí*) and sandalwood (*chandan*) with water: and a small portion of these three mixtures, each about the size of a rupee, is put upon the first leaf of the *síáh*, the name of some Hindu deity having been previously engrossed. *Punyá*, literally 'pure,' 'holy,' is the holy or auspicious day at the commencement of the year, chosen by the Brahmins for fixing the rent of the coming year and paying the first instalment, the first payment being made by the raiyat, whose family for generations has been in the habit of so doing. The correctness of any of the other accounts can be tested by referring to the *síáh*.

The *Tirij-Jamá-Kharch* (literally, "abstract of receipts and disbursements") is an abstract of the *síáh*, and is made therefrom. It shows concisely the total collections and total disbursements, and is usually submitted by the gomashtah to the zemindar at the close of the year when the accounts are finally passed.

The complete system of accounts above described is not to be found in every *Zemindarí Sarrishtah*, and in every district. The nearest approach to completeness is to be met with where the estates and the number of raiyats are large, all parts of the system being then useful to show distinctly the different details just explained. Where the estates are small and the number of raiyats few, there is not the same necessity for separate details. In all districts, however, the *síáh* and *jamá-wásíl-bákí* or books of account differently named perhaps, though in all essential particulars corresponding thereto, are to be met with. Where the other accounts are not kept, the *jamá-wásíl-bákí* is written up from the *síáh*. It should always be remembered that the *jamá-wásíl-bákí* is not the account-book which contains the *original entry of the transaction*, and that it may or may not be written up by a person who had no personal knowledge thereof. In large estates, in which the rents are collected at several places, there is generally a head office or *sadr sarrishtah* to which the receipts and accounts are forwarded. The *jamá-wásíl-bákí* prepared from these materials at the head office would, of course, be less reliable than a similar account prepared by the *amlah*, who had themselves received the rent. Where the zemindar and the *raiyats* are on good terms, and there is no contest going on as to measurement of land or enhancement of rent, the *jamá-wásíl-bakí* may, however, generally be relied upon. Where such is not the case, where there are disputes and consequent litigation, and this account-book is produced on the side of the *zemindar* and by his *amlah* to prove any essential portion of his case, it cannot be too carefully tested and examined, and cannot be received with too great caution.

The zemindar may be wholly above a resort to forged documents or false evidence, but he may be indolent or may willingly leave in the hands of his *amlah* what appears to belong to their province.

Books of account in India are not bound as in England, but consist of long strips of paper secured together by a string. The uniformity of the marks of use on the edges of these strips makes it almost impossible to insert a new leaf without the insertion being detected; and as the number of leaves in each book is usually entered at the beginning of the particular book or of the series of accounts, the absence of a leaf may easily be discovered.

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